INDEX

Docket Entries:	Page
Order of Submission	1
Order Directing Filing of Opinion and Dissenting Opinion and Recording of Judgment	2
Judgment	3
Petition for Naturalization	4
Findings of Fact, Conclusions of Law and Recommendation of Designated Naturalization Examiner	7
Administrative Preliminary Examination	19
Order to Report for Induction	33
Certificate of Acceptability	34
Testimony of Ib Otto Astrup (Reporter's Transcript of July 16, 1968)	35
Memorandum of Decision	43
Notice of Appeal	48
Opinion of the Court of Appeals, Rendered July 8, 1970	49

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, *Petitioner*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed October 12, 1970
Certiorari Granted January 18, 1971

DOCKET ENTRIES

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Monday, July 6, 1970

Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge

ORDER OF SUBMISSION

This cause coming on for hearing, Paul N. Halvonik, Attorney at Law, argued for the appellant, and David R. Urdan, Assistant U. S. Attorney, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

United States Court of Appeals
For the Ninth Circuit

Excerpt from proceedings of Wednesday, July 8, 1970

Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
For the Ninth Circuit

No. 23859

Ib Otto Astrup,
Petitioner-Appellant,
vs.
Immigration & Naturalization Service,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 8, 1970

ORIGINAL
(To be retained by Clerk of Court)

UNITED STATES OF AMERICA

PETITION FOR NATURALIZATION

Filed under SECTION 316(a)

No. [illegible]

To the Honorable

The DISTRICT Court of THE UNITED STATES of SAN FRANCISCO, CALI

This petition for naturalization, hereby made and filed, respectfully shows:

(1) My full, true, and correct name is IB OTTO ASTRUP

(2) My present place of residence is 1960 Parkside Drive, Walnut Creek, Contra Costa, California
(Number and street) (City or town) (County) (State)

(3) My occupation is Food store manager

(4) I was born on November 23, 1926 in Odense Denmark
(Month) (Day) (Year) (City or town) (Country)

(5) My personal description is as follows: Sex Male, complexion FAIR, color of eyes Green, color of hair Dark Blonde
height 6 feet 1 inches, weight 190 pounds, visible distinctive marks None

(6) I am a citizen, subject, or national of Denmark
country of which I am a citizen, subject, or national

(7) I am married; the name of my wife (husband) is Lis-Annette, born Hesserschmidt
(or was married on June 12, 1960 at Martinez California
(Month) (Day) (Year) (City or town) (State)
at Copenhagen Valby Denmark, on April 11, 1936 and entered the United
(City or town) (County) (Country) (Month) (Day) (Year)
States at Los Angeles, California November 3, 1959 for permanent residence in the United States
(City or town) (State) (Month) (Day) (Year)
and now resides at (with me)
(Number and street) (City or town) (County) (State)
and was naturalized on (Month) (Day) (Year)
at (City or town) (County) (State), certificate No. ; or became a citizen by

(7a) (If petition is filed under section 319 (a), Immigration and Nationality Act.) I have resided in the United States in married union with my United States citizen spouse for at least 3 years immediately preceding the date of filing this petition for naturalization, and have been physically present in the United States at least half of that time.

(7b) (If petition is filed under section 319 (b), Immigration and Nationality Act.) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or subsidiary thereof, or of a public international organization in which the United States participates by treaty or statute, or is authorized to perform the ministerial or security functions of a religious denomination having a bona fide organization within the United States, or is employed solely as a missionary by a religious denomination or by an interdenominational mission organization having a bona fide organization within the United States, and hath husband or wife is regularly stationed abroad in such employment. I intend in good faith upon naturalization to live abroad with my spouse and to reside my residence within the United States immediately upon termination of such employment abroad.

(8) I have one living children.

(9) My lawful admission for permanent residence in the United States was at New York, New York
(City or town)
under the name of IB OTTO ASTRUP on February 20, 1950
(Month) (Day) (Year)
on the S.S. "Oslo Fjord"
(Name of vessel or other means of conveyance)

(10) Since my lawful admission for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, except as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Point	Date (Month, day, year)	Vessel or Other Means of Conveyance	Point	Date (Month, day, year)	Vessel or Other Means of Conveyance

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen. (12) It is my intention to reside permanently in the United States. (13) I am not and have not been for a period of at least 10 years immediately preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch, affiliate or subdivision thereof nor have I during such period believed in, advocated, engaged in or performed any of the acts or activities prohibited by that Act. (14) I am able to read, write and speak the English language (unless exempted thereunder). (15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. I am willing, if required by law, to bear arms on behalf of the United States, to perform noncombatant service in the Armed Forces of the United States, and to perform work of national importance under civilian direction (unless exempted thereunder). (16) I have resided continuously in the United States since Feb. 20, 1950 and continuously in the State in which this petition is made for the term
(Month) (Year)
of 6 months at least immediately preceding the date of this petition and I have been physically present in the United States for at least one-half of the 5 year period immediately preceding the date of this petition. (17) I have NOT heretofore made petition for naturalization No.
on (Month) (Day) (Year) at (City or town)
the (Number) Court, and such petition was denied by that Court for the following reasons and causes, to wit:

(18) All marked boxes and made a part of this, my petition for naturalization, are the affidavits of at least two credible witnesses required by law.
(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to
(NONE)

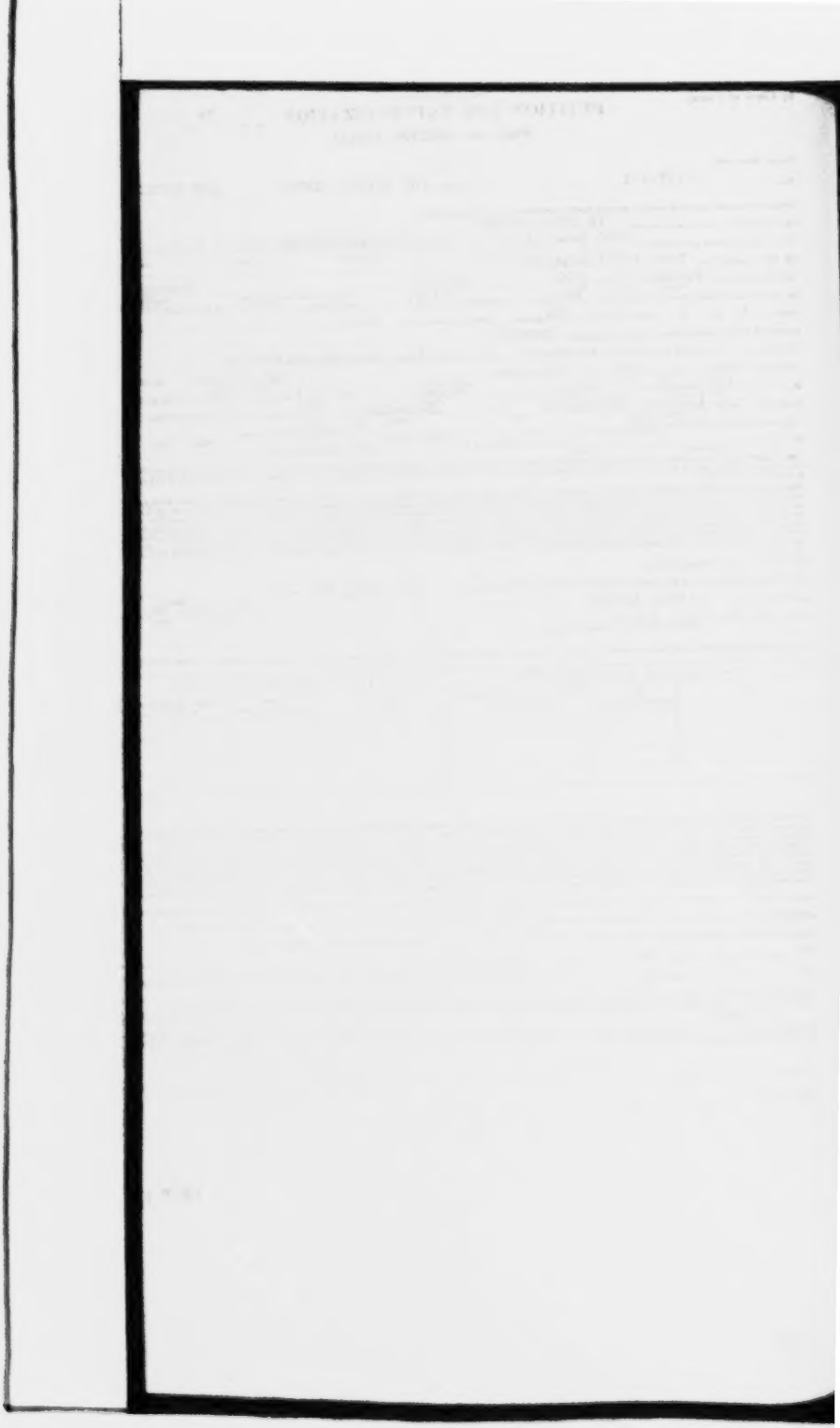
I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name. SO HELP ME GOD.

ALIEN REGISTRATION NO. A-7 425 039

[signature]
(Petitioner's usual signature)
IB Otto Astrup

Form N-400
(Rev. 11-1-62) FFI LPC-10-64-1961-1003

[R.T. 1]



AFFIDAVIT OF WITNESSES

(1) My name is Jonny J. Astrup, my occupation is Housewife
I reside at 895 Daving Ave., Lafayette, California
(2) My name is Jonny M. Tallisch, my occupation is Housewife
I reside at 321 - 27th Street, San Francisco, California

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with the petitioner named in the petition for naturalization of which this affidavit is a part, since at least May 1, 1950 to my personal knowledge the petitioner has resided, continuously preceding the date of filing this petition, in the United States continuously since the date last mentioned; that the petitioner has been physically present in the United States for at least 31 months of that period; and that the petitioner has been a resident in the State in which the petitioner resided for at least 3 months. I have personal knowledge that the petitioner is, and during all such periods has been a person of good moral character, well disposed to the good order and happiness of the United States, and in my opinion the petitioner is entitled to be admitted to citizenship of the United States. I have no interest in the petitioner's petition for naturalization. I have not been convicted of any crime or misdemeanor, and have no bias or prejudice for or against the petitioner. I am not related to the petitioner nor to any of the petitioner's witnesses to this petition for naturalization. I have read the petition for naturalization subscribed by me and the statements therein contained are true to the best of my knowledge and belief. SO HELP ME GOD.

Jonny J. Astrup (Signature of witness)

Jonny M. Tallisch (Signature of witness)

WHEN OATH ADMINISTERED BY CLERK OR DEPUTY CLERK OF COURT

Subscribed and sworn to (affirmed) before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit, and filed by said petitioner, in the office of the clerk of said court at SAN FRANCISCO, CALIFORNIA this 14th day of May, A. D. 1965

JAMES P. WELSH, Clerk.
By Lucille Edwards, Deputy Clerk
For the Clerk
ju

seal

WHEN OATH ADMINISTERED BY DESIGNATED EXAMINER

Subscribed and sworn to (affirmed) before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit at ..... this ..... day of ....., A. D. 19....

.....
Designated Examiner.

I HEREBY CERTIFY That the foregoing petition for naturalization was by petitioner named therein filed in the office of the clerk of said court at ..... this ..... day of ....., A. D. 19....

.....
Clerk.

.....
Deputy Clerk.

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;

that I will bear arms on behalf of the United States when required by the law;

that I will perform noncombatant service in the Armed Forces of the United States when required by the law;

that I will perform work of national importance under civilian direction when required by the law;

and that I take this obligation freely without any mental reservation or purpose of evasion: SO HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

Subscribed and sworn to (affirmed) before me this 13th day of May, 1965

Jonny J. Astrup
(Signature of Petitioner)

NOTE: In renunciation of title or order of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or order) which I have heretofore held," or "I further renounce the order of nobility (give order of nobility) to which I have heretofore belonged."

Petition granted and Certificate No. [illegible] issued. Ineligible under Sec. 316 (a) - file 14
Petition denied: List No. .....
Petition withdrawn: May 1960 - submitted - See file.
Admitted to Citizenship - Naturalization
Order "Petitioner admitted to citizenship" August 21, 1965 See file.
Certificate of Naturalization No. [illegible] issued Sept. 27, 1965
Order "Petition for Naturalization denied" Sept. 27, 1965
Order "Petition for Naturalization granted" Nov 15, 1965

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST:
C. C. EVENSEN,
Clerk, U. S. District Court
Northern District of California
June R. Seaber
Deputy Clerk
Dated February 3, 1969

[R.T.2]

In the District Court of the United States in and for the Northern District of California at San Francisco

Petition for Naturalization of Ib Otto Astrup	No. 168753

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DESIGNATED NATURALIZATION EXAMINER

To the Honorable, the Judges of the United States District Court for the Northern District of California

I

The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of Denmark, age 41 years, who has resided in the United States continuously since his lawful admission for permanent residence on February 20, 1950, filed the petition for naturalization numbered above on May 14, 1965, under the provisions of section 316(a) of the Immigration and Nationality Act, 8 U.S.C. 1427.

The question presented is whether the petitioner has established that he is not barred from naturalization by virtue of the provisions of section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, the question arising by reason of the fact that on Novem-

ber 15, 1950, on his own request, the petitioner was exempted from training and service in the Armed Forces of [R.T. 3] the United States on the ground of alienage.

II

The petitioner's occupation is that of food store manager. He was married on June 12, 1960, to a native and citizen of Denmark and as of the date of the filing of the petition, had one child, a boy, born on February 11, 1964. The chronology of events pertinent herein is as follows:

November 23, 1926—Petitioner born in Denmark.

February 20, 1950—Petitioner admitted to the United States lawfully and for permanent residence.

About August 1950—Petitioner registered under the Selective Service Act of 1948.

September 1950—Petitioner completed Classification Questionnaire (Not sworn to, question as to classification he felt appropriate—page 7—not answered).

September 20, 1950—Classified I-A (then age 23 years) and ordered to report for induction.

October 11, 1950—Examined and found acceptable for service.

November 3, 1950—Ordered to report for induction on November 17, 1950.

November 14, 1950—Executed SSS Form 130—Request for exemption on the ground of alienage.

November 15, 1950—Re-classified IV-C.

August 6, 1952—Re-classified I-A.

August 18, 1952—Ordered to report for medical examination.

September 2, 1952—Examined and found not physically fit for military service. Deferred for three months.

November 24, 1952—Classified V-A, over 26 years of age. [R.T. 4]

III

The petitioner was required to register by section 3 of the Selective Service Act of 1948, c.625, 62 Stat. 604. Section 4(a) of that Act provided in pertinent part as follows:

> "* * * * * * Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if prior to his induction into the Armed Forces, he has made application to be relieved from liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

Executive Order 9992 of August 28, 1948 (Published 13 F.R. 5033, August 31, 1948) in pertinent part read as follows:

> "6. Section 622.18 of Part 622, Classification Rules and Principles, is amended to read as follows:

Section 622.18 Class IV-C: Aliens. * * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who, prior to his induction, has made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Military Service (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's cover sheet (SSS Form No. 101.)"

It will be noted that under the foregoing quoted sections, *any* alien in the United States could claim exemption on the ground of alienage.

On June 19, 1951, the Selective Service Act of 1948 was amended. Among other changes, the title was changed to read "Universal Military Training and Service Act" and the exemption available to aliens admitted for permanent residence was eliminated. Section 4(a) Universal Military Training and Service Act. 65 Stat. 75, 50 U.S.C. Appendix 454. **[R.T. 5]**

Executive Order 10292 of September 25, 1951, (Published 16 F. R. 9862, September 28, 1951) amended the Selective Service Regulations to carry out the legislation. Section 1622.42 relating to IV-C aliens then read in pertinent part as follows:

"Section 1622.42 Class IV-C: Aliens. * * * *

(b) In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent

residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the armed forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form No. 130), executed in duplicate. * * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who is certified by the Department of State to be or otherwise establishes that he is, exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national."

Preliminarily, it may be stated that at all times mentioned herein, there was no treaty between the United States and Denmark exempting the nationals of one country from military service in that of the other.

The initial question to be determined is whether the petitioner understood the forms he was signing and made an intelligent choice when he applied for exemption.

In his application for an immigrant visa executed before the United States Consul at Copenhagen, Denmark on November 22, 1949, the petitioner stated that he was "able to speak, read and write the following languages or dialects: Danish, English". In a continued Designated Examiner Hearing on September 2, 1966, the petitioner stated that he had attended school for eight years prior to coming to the United

States; that this would be the equivalent of finishing high school; that he continued his education on a **[R.T. 6]** part time basis thereafter; that when he came to the United States he could speak a little English because he had studied it at school; that in the United States he worked as a grocery clerk mostly among English speaking people and that he could read English fairly well. When he planned to come to the United States he understood that there was no draft law in effect; that if he knew he might have to serve he would not have come to the United States; that he had served in the Danish Navy for 14 months and that he planned to return to Denmark after a year or at most two years from the time of his arrival in this country. Later, when he had acquired ties in the United States, and when he was reclassified I-A in 1952, he had decided to remain and was willing to serve. He admits having read the application for exemption from military service.

The form signed by the petitioner on November 14, 1950, read in part:

> "I hereby apply for relief from liability for training and service in the armed forces of the United States. I have read the NOTICE given below, and I understand that I will forever lose my rights to become a citizen of the United States, and I may also be prohibited from entry into the United States or its territories or possessions as a result of filing this application."

The "NOTICE" referred to was as follows:

> "Section 4(a) of the Selective Service Act of 1948, provides in part that "any citizen of a foreign country, who is not deferrable or exempt

> from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title, if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who make such application shall thereafter be debarred from becoming a citizen of the United States." (Underscoring supplied.) Under other existing law, an alien who is not a permanent lawful resident of the United States at the time of execution of this application, thereafter becomes barred from ever making [R.T. 7] an entry for permanent residence into the United States, including Alaska, Hawaii, Puerto Rico, and the Virgin Islands, unless he enters as a minister of any religious denomination or as a professor of a college, academy, seminary, or university."

It seems clear that the petitioner does not come within the rule of Moser v. United States, 341 U.S. 41 (1951).

The petitioner's eligibility for naturalization must be determined under section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, which reads in part as follows:

> "(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was re-

lieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

In Ceballos v. Shaughnessy, 352 U.S. 599, 1 L. Ed. 583, 77 S. Ct. 545, it was stated "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship; the alien must be 'one who applies or has applied for exemption', and also one who 'is or was relieved or discharged from such training or service on such ground.'" 352 U.S. at 606.

This section is retrospective. United States v. Mirzoeff, 2d Cir. 1958, 253 F. 2d 671, affirming In re Mirzoeff, DCNY 1956, 143 F. Supp 177. See also In re Aklins Petition, USDC ED NY 1963, 222 F. Supp 857, affirmed 340 F. 2d 746.

There can be no question but that the petitioner applied for and was [R.T. 8] granted exemption for liability for military service on the ground of alienage. The sole issue to be determined is whether he was "effectively" relieved since his deferred classification was revoked without any action on his part and had he been found physically fit, he might well have found himself inducted.

It is the view of the Immigration and Nauralization Service that if the petitioner had been inducted

he would be eligible for naturalization within the rule of the United States v. Lacher, 9th Cir, 1962, 299 F. 2d 919; United States v. Hoellger, 2d Cir, 1960, 273 F. 2d 760. However, he was not inducted, he performed no military service, and hence the rule in those cases does not apply.

This is not a case of first impression in the Ninth Circuit. The facts are very similar to those in the case of Lapenieks v. Immigration and Naturalization Service 389 F. 2d 343, affirming Petition of Lapenieks, USDC California SD 1965, 249 F. Supp. 398. In that case the petitioner was born in Latvia on November 10, 1931, entered the United States in 1952, registered that same year under the Universal Military Training and Service Act, was classified I-A in October 1952, applied for exemption on the ground of alienage on November 15, 1952, and was classified IV-C on November 20, 1952. On March 1, 1956, his IV-C classification was revoked and he was reclassified I-A, available for military service. On August 20, 1957, he was classified IV-F after a physical examination. His petition was denied because of his claim of exemption on the ground of alienage.

The majority opinion holds that the petitioner was "effectively" relieved from service because he was in IV-C classification from November 20, 1952, to March 1, 1956, a time when the Korean hostilities were taking place. **[R.T. 9]** Justice Duniway dissented, stating in effect that the length of the deferment and the fact that hostilities were taking place during that

period were immaterial; the reclassification into I-A eliminated his exemption and hence should eliminate his ineligibility for citizenship. Justice Duniway felt that the rule in the Lacher case, supra, and the cases relied thereon should apply.

Since the petitioner in the instant case was placed in a deferred classification on the ground of alienage, that is IV-C, and was in that deferred classification from November 15, 1950, to September 2, 1952, and since he never did serve in our armed forces, and this deferment was made at his request, he was "effectively" relieved from military service and comes within the rule of the Lapenieks case, supra. The petition should be denied.

IV

Pursuant to the provisions of section 335 of the Immigration and Nationality Act, 8 U.S.C. 1446, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

(a) That the petitioner is an alien and filed a petition for naturalization on May 14, 1965, under the provisions of section 316(a) of the Immigration and Nationality Act;

(b) That the petitioner on February 20, 1950, entered the United States lawfully and for permanent residence and at all times since then and now is a lawful permanent resident of the United States;

(c) That the petitioner was obligated to and in August of [R.T. 10] 1950 did register under the Selective Service Act of 1948;

(d) That on November 14, 1950, the petitioner applied to be relieved from liability for training and service in the armed forces of the United States on the ground that he was an alien;

(e) That when he applied for exemption from military service on the ground of alienage the petitioner knew full well that he would thereby become permanently ineligible for citizenship in the United States;

(f) That the petitioner was relieved from liability for military training and service in the armed forces of the United States on the ground of alienage on the basis of his application for relief on that ground;

(g) That on August 6, 1952, the petitioner was classified I-A available for military service, without a request therefor by him or anyone acting on his behalf;

(h) That on September 2, 1952, the petitioner was examined and found not physically fit for military service;

(i) That on November 24, 1952, the petitioner was classified V-A because he was then over the age for induction, to wit, 26 years.

CONCLUSIONS OF LAW:

(a) That the petitioner applied for and was granted exemption from liability for training and service in the armed forces of the United States because of alienage;

(b) That the petitioner has failed to establish that he is not [R.T. 11] barred from naturalization by virtue of the provisions of section 315 of the Immigration and Nationality Act. 8 U.S.C. 1426.

V

I recommend that this petition for naturalization be DENIED on the ground that the petitioner is barred from naturalization under the provisions of section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426.

/s/ F. P. Boland
Designated Naturalization Examiner

5/22/68
Date [R.T. 12]

U.S. Exhibit No. 1
Filed May 22, 1968
James P. Welsh, Clerk
/s/ By June A. Mecchi
Deputy Clerk

ADMINISTRATIVE PRELIMINARY EXAMINATION

United States Department of Justice
Immigration and Naturalization Service
Court No. 245

Petition No. 168753

Petition for Naturalization
or
Ib Otto Astrup

PRELIMINARY EXAMINATION

Date:	September 2, 1966
Place:	San Francisco, California
Counsel for Petitioner:	None
Designated Examiner:	Francis P. Boland
Examiner Officer:	None
Interpreter	None
Stenographer:	Statement taken on record by Designated Examiner

Examiner to Petitioner:

Q. From my preliminary conversation with you, I have concluded that you are able to speak and understand the English language. Is this conclusion a correct one?

A. Yes, it is.

Q. In this same connection, you are advised that if, at any time during the proceeding which is to follow, you do not understand a question I might ask you, I shall restate or rephrase it upon

request, until there is a full comprehension on your part. Do you understand?

A. Yes, I do.

Q. You are now informed that I, Francis P. Boland, am a naturalization examiner of the Immigration and Naturalization Service, duly designated under, and authorized by, Section 335(b) of the Immigration and Nationality Act to conduct preliminary examinations on petitions for naturalization and to make recommendations to the courts regarding the petitioner's qualifications for admission to citizenship. As a designated examiner, it is my purpose at this time to conduct a further preliminary examination on your petition for naturalization as a basis for formulating a recommendation to the court [R.T. 13] regarding your eligibility for admission to citizenship. Do you understand?

A. Yes, I do.

Q. At this preliminary examination you have the right to be represented by counsel of your own choice and at your own expense. Such counsel may be an attorney at law or any other person qualified to practice before the Immigration and Naturalization Service. Do you understand?

A. Yes, I do.

Q. Do you desire to have an attorney or someone else to represent you during this preliminary examination?

A. No, I don't.

Q. I now advise you that if at any time during this preliminary examination you make known your wish to obtain representation by counsel, I will continue the proceeding to afford to a reasonable opportunity to do so. Do you understand?

A. Yes, I do.

Q. You are further advised that any statement you may make during this preliminary examination shall be voluntary and that it may be used against you in any criminal or civil proceedings. Do you understand and are you willing to make a statement under such conditions?

A. Yes, I am.

Q. You are also informed that your statements during this preliminary examination will be made under oath and that under the law anyone who knowingly makes a false statement under oath in any naturalization proceeding may be subject to fine, imprisonment, or both. Do you understand and are you willing to make a statement under oath?

A. Yes, I am.

Q. During this preliminary examination, you have the right to offer evidence to establish your eligibility for naturalization or meet any evidence adverse thereto which may be presented by the government, to present witnesses in your own behalf and to cross-examine witnesses called by the government. Do you understand?

A. Yes, I do. **[R.T. 14]**

Q. Please stand and raise you right hand. Do you solemnly swear that the statements you are about to make during this preliminary examination will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, I will.

Q. Are you the same Ib Otto Astrup who filed Petition No. 168753 in the United States District Court at San Francisco on May 14, 1965?

A. Yes, I am.

Q. You are advised that this statement which you make today will be transcribed and designated Exhibit 1. The documents which are offered and received in evidence will be designated Exhibit 1-A, 1-B, and so on in sequence. Do you understand?

A. Yes, I do.

Q. I will show you an application to file a petition for naturalization, Form N-400, and ask if that is your signature on Page 4 in the jurat, that is the sworn to part under the affidavit?

A. Yes, it is.

Q. I will show you two sheets of paper, one designated supplemental Page one N-400 and the second supplemental Page 2, N-400 and ask if those are your signatures on the pages.

A. They are both mine.

Q. Do you have any objection to this application with the two supplemental pages being accepted and received in evidence at this proceeding?

A. No, I don't.

Q. Do you have any objection to the court considering these papers if and when your case comes on for hearing before the judge on the merits?

A. No, I don't.

Q. I will show you Form N-422 addressed to Mr. Ib Otto Astrup, file A7 425 039 on one side and to Selective Service System on the other side, with a report on that side, dated 13th July 1965, signed by an F. W. Spearman. Do you have any objection to that form being accepted and received in evidence for consideration at this hearing and at the hearing before the judge in court?

A. No, I don't. **[R.T. 15]**

Q. Going back, the Application to File a Petition for Naturalization and the two supplemental pages will be designated as Exhibit 1-A. The Form N-422 will be designated as Exhibit 1-B. I will show you photostatic copies of certain documents from the Selective Service System, including Classification Questionnaire and Application by Alien for relief from training and service in the Armed Forces, the latter being SS Form No. 130, and ask you if you have any objection to these photostatic copies of the records of the Selective Service being accepted in evidence?

A. No, I don't.

Q. Do you have any objection to our considering these documents at this hearing or the judge considering them at the final hearing in court?

A. No, I don't.

Q. I will call your attention to Classification Questionnaire in Exhibit 1-C, the Selective Service System copies being designated as Exhibit 1-C, and ask you if that is your signature on Page 7 of Classification Questionnaire.

A. Yes, it is.

Q. I will show you SS Form No. 130, Application by Alien for Relief from Training and Service in the Armed Forces, and ask you if that is your signature on that form?

A. Yes, it is.

Q. Do you recall signing that form before a notary public?

A. Yes, I did.

Q. I will show you Statement of Dependent Over 18 Years of Age, consisting of three pages, and ask if that is your mother's signature on Page 3 of the form.

A. Yes, it is.

Q. You were born in Denmark on November 23, 1926, were you not?

A. Yes, I was.

Q. How far did you go in school before you came to the United States?

A. I went to school for eight years.

Q. What would that be equivalent to in the United States?

A. It would be equivalent to finishing high school. I went into school at the age of seven and came out at the age of fifteen and one half. [R.T. 16]

Q. Did you go to school afterwards?

A. Yes, I did.

Q. Did you go to school at night or full time in the daytime?

A. I went night school and part time day school.

Q. How long did you go to school in that manner?

A. For three and a half years.

Q. What was your occupation before you came to the United States.

A. That was grocery clerk.

Q. Could you speak English before you came to the United States?

A. A little.

Q. Had you studied English in school?

A. Yes, I had.

Q. How much time had you devoted to studying English before you came to the United States?

A. The last year before coming to the United States, which would be in 1949. I spent the last winter, about eight months of one night a week studying English.

Q. Your file shows that you entered the United States as an immigrant on February 20, 1950. Had you ever been in the United States prior to that time?

A. No, I had not.

Q. What type of work did you do after you came to the United States?

A. I went to work in a grocery store.

Q. Were the customers Danish speaking or English speaking people?

A. They were English speaking people.

Q. Did you have any difficulty with the English language once you arrived in the United States?

A. Oh, I had a little bit, yes.

Q. Could you read and write English at the time you arrived in the United States?

A. I could read it fairly well.

Q. Could you write English?

A. Fairly well. [R.T. 17]

Statement by Ib Otto Astrup, 245-P-168753(Contd)

Q. How soon after your arrival in the United States did you register for the draft?

A. Exactly six months after.

Q. Then that would have been approximately August of 1950, would it not?

A. Yes, it would.

Q. What were the circumstances surrounding your claim of exemption from the draft?

A. The circumstances surrounding the application for deferrment, is that what you are getting to now?

Q. Yes, it is.

A. When I left Denmark, there was no draft law in the United States and that was reenacted,

I believe, in July of 1950 and my feeling at the time was if the law had been in effect when I got my visa, I would not have gone.

Examiner (for the Record):

The Application for Immigration Visa and Alien registration, executed by the petitioner on 22 November 1949, does not contain instructions in regard to registration for the Selective Service System. This application was executed before the Consul of the United States at Copenhagen, Denmark.

Examiner to Petitioner:

Q. After you arrived in the United States and registered for the draft you were furnished a Classification Questionnaire, which is indicated as having been mailed September 5, 1950. Subsequent to completing that questionnaire, were you notified to report for induction?

A. Yes, I was.

Q. After you received that notification to report for induction, did you apply for exemption from the draft?

A. I applied for the exemption from the draft. I guess it was the first part of November, I don't recall exactly.

Q. How did you bring to the attention of the draft board, your desire not to be inducted? Did you initially tell the board or did you contact your Consul for Denmark or the Danish Embassy?

A. I contacted the Danish Consul in town, that is San Francisco and he was the one who told me what I could do and what I could not do. **[R.T. 18]**

Q. Did you contact the Danish Consul before you signed this DDS Form 130, that is the Application by Alien for Relief from Training and Service?

A. To my knowledge, I contacted him on only the one occasion.

Q. Would that be before or after you executed the Defense Department Form 130?

A. That was before.

Q. What were the circumstances surrounding your signing the Application by Alien for Relief from Training and Service?

A. Will you rephrase that?

Q. The file of the Selective Service System, relating to you, contains SS Form 130, Application by Alien for Relief from Training and Service, dated November 14, 1950. It is subscribed and sworn to before a notary on the 14th of November, 1950. You have indicated that that is your signature.

A. Oh, yes, that is it, but I——

Q. What I am getting at is, what were the circumstances surrounding the signing of that form? Did you sign that in the presence of that notary public?

A. I signed that in the presence of the notary public.

Q. Did any one explain the form to you before you signed it?

A. Yes, they did.

Q. Who explained it to you?

A. The local draft board.

Q. Where was that?

A. On Mission (and looking at the form) 2959 Mission Street.

Q. Did you read the part on the form under the word "Notice" which states that you would be forever debarred from becoming an American citizen if you made the application for relief from the draft?

A. Yes, I did.

Q. And did you still go ahead and sign the form?

A. Yes, I did.

Q. What was your basic reason for desiring to be exempted from the military service?

A. I would say that there were three reasons at the time. First, I have said it already. There was no draft law when I left Denmark for the United States. Secondly, after being here for shorter than [R.T. 19] eight months, I did at the time not have any desire to stay and I had planned at the time when I left Denmark to stay a year or a year and a half or at the most two years in the United States. And thirdly, I had prior to leaving Denmark served 14 months in the Danish Navy.

Q. Didn't your mother's dependency on you have some factor also?

A. It did have some factor on it. That was another reason why I wanted to go back to Denmark.

Q. Was your mother dependent upon you for support at that time?

A. Not for support, no.

Q. Your mother's affidavit on Page 1 states that you had supported her for three years in the entirety, that is, you had wholly supported her for three years prior to the date of the affidavit, which is September 25, 1950. Was that statement correct?

A. Yes, it was.

Q. How much did you contribute to your mother's support each month during 1950?

A. Oh around $50.00, I believe.

Q. Returning to the execution of the Application for Relief from Training and Service, do you recall who was present in the office of the Selective Service System when it was read and explained to you?

A. No, I don't.

Q. Do you recall how many people were present in connection with your application for Relief?

A. As far as I can remember there was only one. A man.

Q. Was he the one who swore you to the form?

A. No, he was not.

Q. Then who did swear you to the form? A person present in the office of the Selective Service System?

A. No. They told me to go to the nearest notary and have it done there, because they would not do it.

Q. Then, as I understand it, you went into the office of the Selective Service System, obtained the form there, went out to a notary, had it executed, then did you return with the form to the Selective Service System and turn it in to them? **[R.T.20]**

A. I don't recall if I mailed it or if I went in person.

Q. Then, is there any possibility that you did not understand that by signing this form you would be forever debarred from becoming a citizen of the United States?

A. No, there was not.

Q. Returning to a remark that you made earlier to the effect that you had only one contact with the Danish Consul. The file suggests that you had another contact with a Danish Consul.

A. Yes, but that was later. Two years later.

Q. Then your statement that you had only one contact with the Danish Consul would have been referring to the incidents which occurred prior to the signing of the Selective Service Application for Relief and Training?

A. Right.

Q. Can you recall what the Danish Consul told you in regard to executing the Application for Relief from Training and Service?

A. In 1950?

Q. Yes.

A. Yes, I can remember what he said. He told me exactly what it said on that form.

Q. And you still desired to go ahead and execute the form?

A. I weighed the problem and decided that I was doing the right thing.

Q. Subsequently the Selective Service System reclassified you and ordered you to report for induction, did they not?

A. Right. In 1952.

Q. The Minutes of Action by Local Board and Appeal Board of the Selective Service System indicates that you were classified 1-A on August 6, 1952. Do you believe that that is a correct date when you were classified 1-A?

A. Yes, that is about right.

Q. The Minutes of Action by the local board showed that they mailed you an order to report

for induction on August 18, 1952. Would that be about right?

A. Right.

Q. Did you report for induction?

A. Yes, I did. **[R.T. 21]**

Q. What happened when you reported for induction?

A. I was given a physical examination, reclassified—no and for three months I was temporarily deferred.

Q. Then what happened?

A. And then after the three months, I was mailed a classification as 5-A, I believe, two days after my 26th birthday.

Q. Is there anything else that you would care to add to the problem which is confronting our Service and the judge before whom your case will undoubtedly be called, that is in regard to your claim of exemption?

A. Not in regard to the claim of exemption, but in regard to what I did in 1952 when I was told that the exemption was no more valid and I found out through questioning the local board and I contacted the Danish Consul once again, I decided that the only thing was to report for induction.

Q. At that time, had you changed your mind as to remaining in the United States?

A. At that time, I had.

Q. At that time, did you intend to reside permanently in the United States, that is, I'm not referring to any tempoary absences on visits, but to make your home in the United States, make your living in the United States and bring up your children, if any at that time, in the United States?

A. Yes, I had changed my mind and when I was reclassified, I realized that I had to make up my mind, whether I would stay in the United States, or go home.

Q. Then you decided that you would make your home in the United States?

A. Right.

Q. Is there anything else you wish to add to what you have said before in regard to any of the matters on which we touched?

A. No, there is not.

Q. At the present time, if the United States ask you to serve in our Armed Forces, would you do so?

A. I sure would. [R.T. 22]

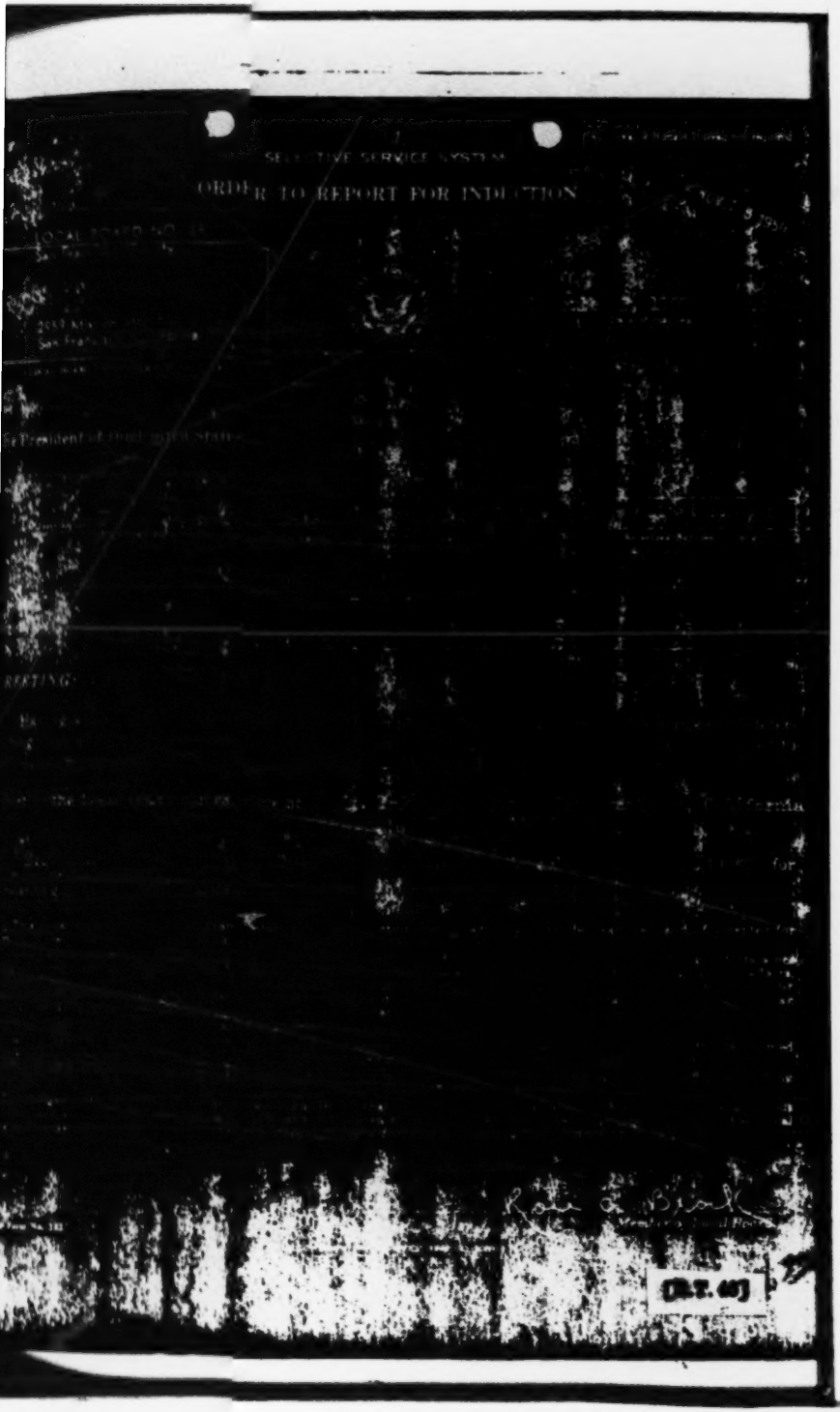
I certify that the foregoing is a correct and complete record of the examination conducted before me this date.

F. P. Boland

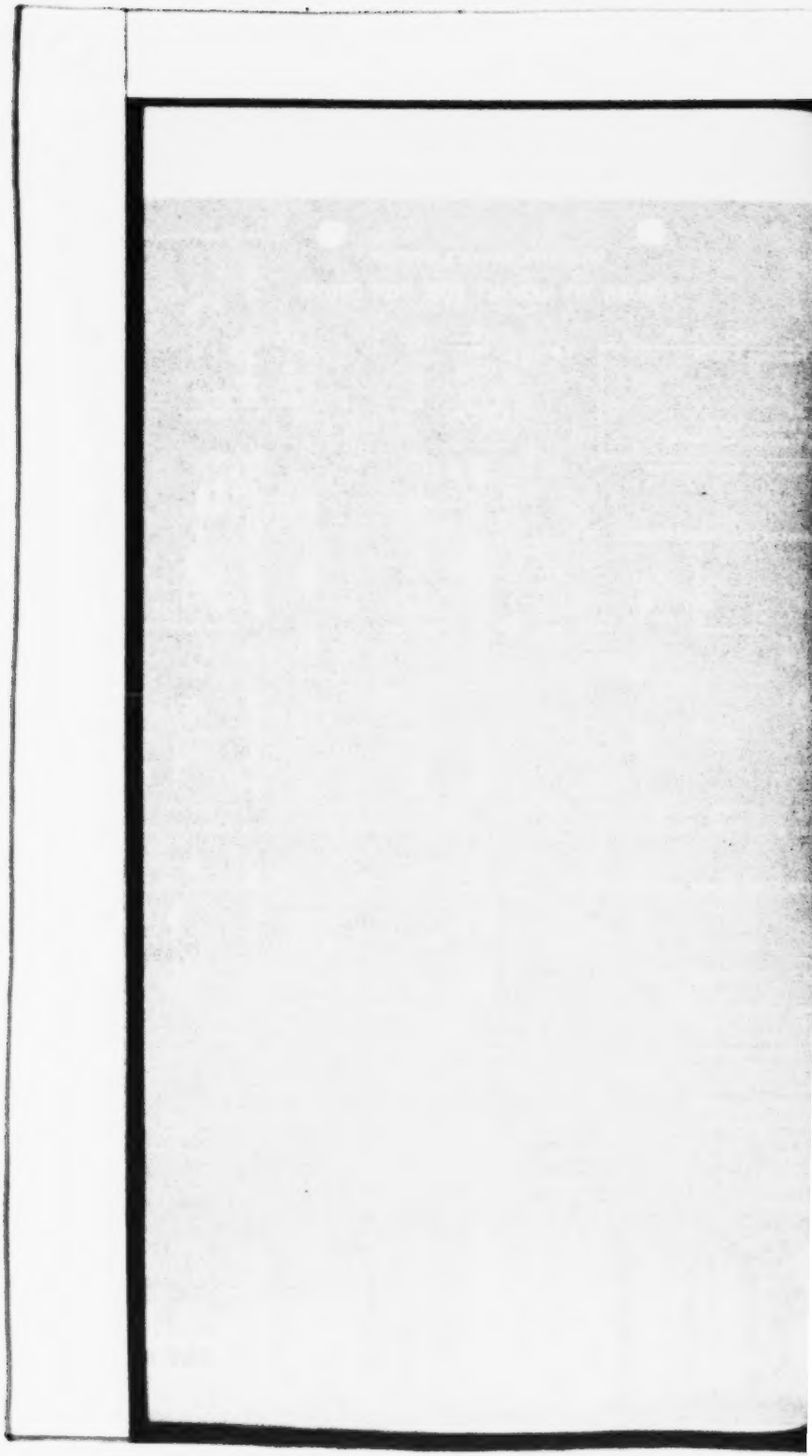
Francis P. Boland, Designated Examiner

I certify that the foregoing is a true and correct transcript of a mechanically recorded record made during this preliminary examination.

Faye Lothridge, Transcriber [R.T. 23]


SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION



CERTIFICATE OF ACCOUNTABILITY

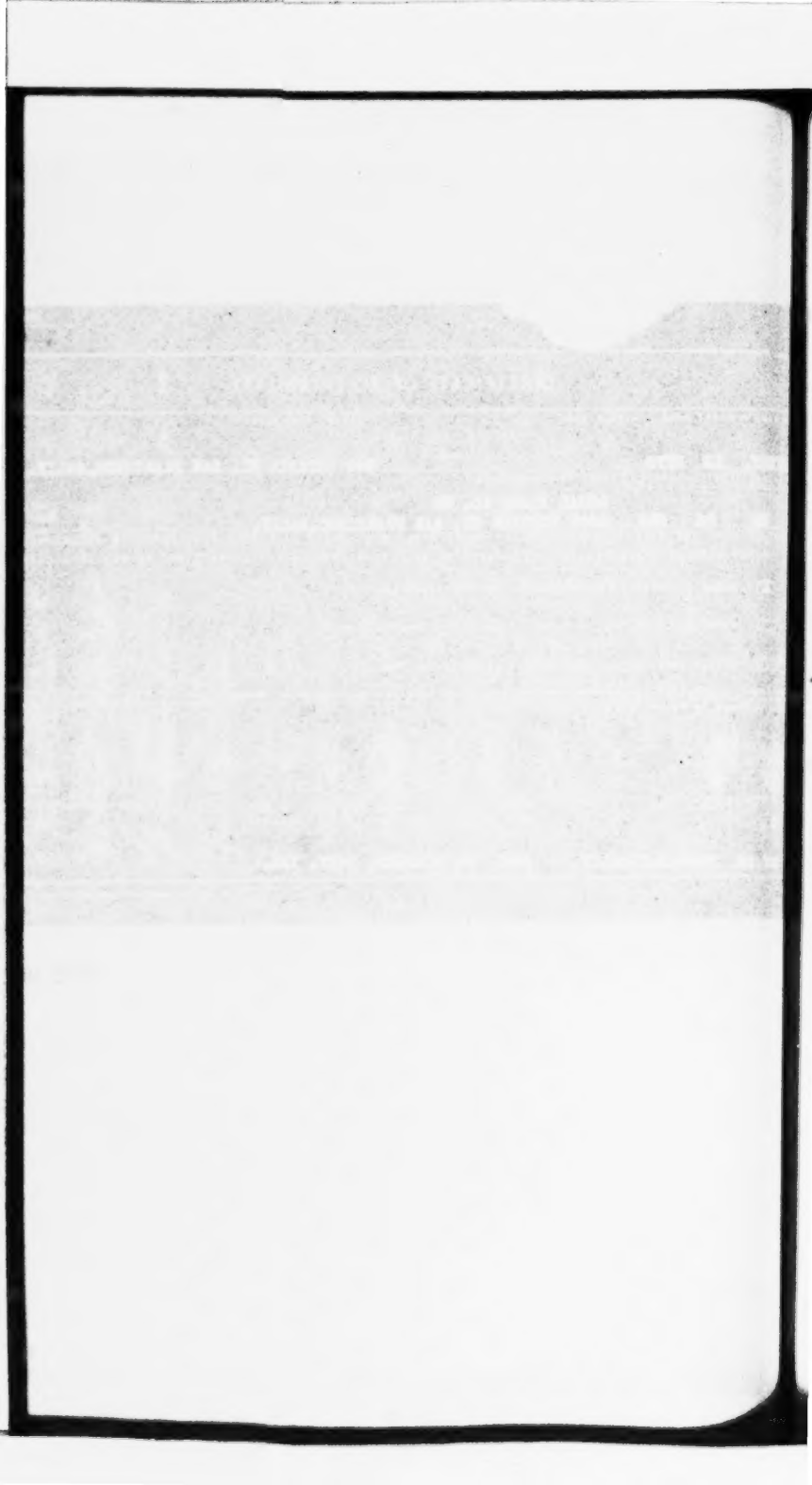
ARTHUP, IR OTTO 640 OCTAVIA ST. SAN FRANCISCO, CALIF.

LOCAL BOARD NO. 89
29 26 GLS 2959 MISSION ST. SAN FRANCISCO, CALIF.

I

OCT, 40 PRES. S.F. CALIF. CARL H. WORDLEY, CAPT. INF.

[R.T. 49]



TESTIMONY OF IB OTTO ASTRUP
(Reporter's Transcript of July 16, 1968)

THE WITNESS: Ib Otto Astrup.

DIRECT EXAMINATION

BY MR. KRAUSE:

Q. Mr. Astrup, be sure to speak up now so everyone can hear you. Are you the petitioner in this application to be admitted to United States citizenship?

A. Yes, I am.

Q. And where were you born?

A. I was born in Denmark.

Q. What is your age at the present time?

A. Forty-one.

Q. Forty-one did you say?

A. Yes, forty-one.

Q. And what is your present occupation?

A. I'm in the grocery business. I'm store manager for a chain in Oakland.

Q. And whereabouts do you live?

A. I live in Walnut Creek.

Q. What is your family status?

A. I'm married, I have one son.

Q. How old is your son?

A. Four years old.

Q. When was it that you got married? [J.R.T. 4]

A. Well, I got married second time was in 1960.

Q. Now, I just want to summarize a few dates, and you tell me whether this is correct.

I just want you to tell me whether this summary, which is from the record, is correct. You entered the United States in February of 1950?

A. Yes, I did.

Q. And you registered for the Selective Service System in August of 1950?

A. Correct.

Q. And you claimed an exemption as an alien in November of 1950?

A. That's right.

Q. Then in 1952, in August, you were reclassified I-A and ordered to report for induction in September of 1952?

A. That is right.

Q. And in September of 1952 you reported and you were found to be physically unfit and were not taken; is that right?

A. That's right, yes, I was deferred for 90 days.

MR. KRAUSE: Now, I might interject, Your Honor, the reason why there was a change is that the law was changed in 1952 to change the situation about an alien's responsibility under the Selective Service act. **[J.R.T. 5]**

Q. Now, for what purpose, Mr. Astrup, did you enter the United States in 1950?

A. Well, I felt like—I had a brother over here, and I felt like I would like to come over here to United States and find out if I would like to live here as much as my brother did, and at the time that I entered, the first year or so I was not of any mind, or so to speak, whether I wanted to make it a permanent place to live.

Q. In other words, when you entered in 1950, you did not have any decision as to whether you would permanently reside in the United States?

A. Absolutely not, no.

Q. Now, I'm going to show you, after showing it to Mr. Boland, a Xerox copy of a matter which is in the record before Your Honor, which is Selective Service Form No. 130, application by an alien for relief from training and service in the Armed Forces. You recognize that as a photocopy of a document that you signed (showing to witness)?

A. (Examining) Yes, I do.

Q. Now, would you tell us how it is that you signed that document?

A. My reason for it?

Q. Yes. **[J.R.T. 6]**

A. My reason for it was, at the time that I was drafted that I was kind of a young man, little confused whether I wanted to stay, whether I wanted to stay here or go back home, at that first seven, eight or nine months I hadn't made up my mind, and when I got my draft notice, it upset my thinking a lot more, because I knew I had to make a decision one way or the other, but if I went in the United States Army for two years, since I just come out of the Danish Navy after fourteen months, just before I went over there—before I came to United States, and I just felt if I did go in it would make me more or less permanent over here, and I just decided that since I was—I had this right, that I would sign the——

Q. In other words, is it correct to say that you—at the time you signed that document in November of 1950, you were not sure whether you wanted to stay in this country?

A. Right.

Q. Now, at the time you signed that document, what was your belief as to what it granted you as an exemption from the United States Military Service?

A. That it would grant me a permanent exemption.

Q. Was it your belief that if you signed that waiver of the right to be a United States citizen, that you would be permanently exempt from the Selective [J.R.T. 7] Service System?

A. Yes, that was my impression.

Q. Was there any language in that document which you signed which led you to believe that?

A. Says right here, "Shall be relieved from liability for training and service under this title."

Q. And you construed that to mean shall be permanently relieved?

A. Right.

Q. Now, at the time you signed that document, Mr. Astrup, or any time before, did anyone ever tell you that that exemption from military service could be removed?

A. No, absolutely not.

Q. Mr. Astrup, if you had known at the time you signed that document that any time in the future the United States Government could remove that exemption from military service and call you in to the United States Army, and you would still be ineligible for United States citizenship, would you have signed that document?

A. No, I would not.

Q. Then, would it be correct to say that you signed that document under a misconception as to its legal consequences? [J.R.T. 8]

A. Yes, you can say that.

Q. Now, I want to move on to 1952, when you were ordered to report for induction, at that time did you believe that you would be actually taken into the Army?

A. Absolutely.

Q. Were you employed at that time?

A. Yes, I was.

Q. What did you do about your job?

A. I told my employer that I was being drafted and they wouldn't see me for two years, or whatever the term was at that time.

Q. And was there any feeling in your mind that you would be found physically unfit?

A. No, absolutely not.

Q. In other words, you had no reason to believe

A. Well, except for that little bursitis that I had, and that they—that the Army doctors diagnosed and came up with, I absolutely hadn't expected any medical deferment at all.

Q. You had not expected a medical deferment?

A. No, absolutely not.

Mr. Krause: I see. No further questions.

CROSS-EXAMINATION

BY MR. BOLAND:

Q. Mr. Astrup, on September 2nd, 1966, you made a **[J.R.T. 9]** statement to me in the Office of Immigration & Naturalization Service in regard to your claim of exemption?

A. Statement, yes.

Mr. Krause: May he see that, Your Honor, if he's going to be questioned about any statement.

Mr. Boland: Furnished a copy to counsel, and he should have a copy there.

Q. Do you recall having made that statement (showing to witness)?

A. (Examining) You mean this whole—the conversation?

Q. Yes.

A. Yes, I do, sir.

Q. And were the statements that you made at that time true and correct?

A. Yes, they were.

Q. Are there any changes that you would like to make in the statement that you made at that time?

A. Except for what I just said now concerning—what specific in here are you meaning, Mr. Boland?

Q. In other words, what I'm getting at mainly, you contacted the Danish Consul?

A. Right.

Q. For advice? **[J.R.T. 10]**

A. That's right, I contacted them for advice.

Q. You read the claim of exemption before you signed it?

A. The one in 1950?

Q. Yes.

A. Yes, I did.

Q. And you intended to go back home——

A. That was my intention——

The Court: Wait a minute until he finishes the question.

The Witness: Pardon me.

Q. Mr. Boland: After you had stayed a certain length of time. In other words, your trip to the United States was more of an exploratory trip?

A. Yes, it was.

Q. Than to come here permanently?

A. Right.

Q. And you did achieve what you asked for for at least two years? In other words, you were deferred for two years?

A. Right.

The Court: All right, the statement handed to the witness will be marked for identification in the record.

Mr. Krause: I think that's already in the record. [J.R.T. 11]

Mr. Boland: That's in—that's the report to the Court.

The Court: It's the statement of what date?

Mr. Boland: That's the statement of September——

Mr. Krause: September 2, 1966.

Mr. Boland: And it's attached as Exhibit 1-A.

The Court: So it's already in the record.

Mr. Boland: It's in the record.

The Court: Yes.

Mr. Krause: I have a question about that statement.

REDIRECT EXAMINATION

BY MR. KRAUSE:

Q. Mr. Astrup, would you turn to page 7?

A. Yes.

Q. Toward the middle of the page the question is, "Did anyone explain the form to you before you signed it," and your answer is, "Yes, they did."

A. Um-hmm.

Q. And the next question is, "Who explained it to you," and your answer is, "The local draft board."

In what way was the form explained to you by the local draft board?

A. It was handed to me by the, I suppose by the —was the head of that draft board, and in a very rude **[J.R.T. 12]** manner, like I was some not very desirable person for signing the thing, and he just told me, he said, "You can take it anywhere, have it notarized, I will have no part of it," and he walked away from me.

Q. Now, did he ever tell you that the United States Government reserved the right to take away that exemption from military service, and you would still be held to your part of the bargain, that is, you would never be able to be a citizen, did he ever tell you that?

A. No, he did not.

Mr. Krause: No further questions.

Mr. Boland: No questions.

(Witness excused.) **[J.R.T. 13]**

In the United States District Court for the Northern District of California

No. 168753

In re Petition for Naturalization
of
Ib Otto Astrup

MEMORANDUM OF DECISION

This petition for naturalization, brought by Ib Otto Astrup, a native and national of Denmark, is opposed by the Immigration and Naturalization Service.

On July 16, 1968 a hearing was held before this court, oral testimony was taken, and the matter submitted on briefs by both parties.

The undisputed facts of the case are substantially as follows:

On February 20, 1950 petitioner was admitted to the United States for permanent residence. On August 20, 1950 he registered with the Selective Service System. On November 14, 1950 he signed an "Application by Alien for Relief from Training and Service in the Armed Forces." On November 15, 1950, pursuant to Section 4(a) of the Selective Service Act of 1948 (50 U.S.C. App. § 454(a) (1950)), which provided an exemption from military training and service for aliens, his draft board classified him IV-C (alien not currently liable for military service). In 1951 Congress amended the Selective Service Act of 1948 so that Section 4(a) no longer provided a pro-

cedure for the exemption of resident aliens, and on August 6, 1952, pursuant to said [R.T. 77] *change,* petitioner's draft board re-classified him I-A (available for military service). On August 18, 1952 it ordered him to report for induction. On September 2, 1952 he was examined and found not physically fit for military service, and on November 24, 1952 his draft board re-classified him V-A (registrant over the age of liability for military service). On May 14, 1965 he filed the pending petition for naturalization.

The Immigration and Naturalization Service opposes this petition on the ground that petitioner is ineligible for citizenship by reason of having applied for and received exemption from military service within the meaning of Section 315(a) of the Immigration and Nationality Act (8 U.S.C. § 1426(a)), which provides:

> "Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Petitioner contends that for three reasons he is not ineligible for citizenship under Section 315(a).

First, he contends that he agreed to become permanently barred from obtaining United States citizenship in return for exemption from military training and service; that the government, by there-

after removing his exemption, failed to keep its part of the bargain; and that, therefore, he should not be bound to keep his part, citing and mainly relying upon the concurring opinion of Judge Moore in *United States v. Hoellger,* 273 F.2d 760, 766 (2d Cir. 1960).

Hoellger held that an alien whose IV-C classification had been removed by the draft because of the abrogation of [R.T. 78] treaty arrangements with Germany, under which he had been exempted from military service, and who was thereupon inducted into the military service, had not been relieved from service within the meaning of Section 315(a). The Court of Appeals for this circuit adopted *Hoellger* in *United States v. Lacher,* 299 F.2d 919 (9th Cir. 1962), where, similarly, the alien's IV-C classification was removed, and he was inducted into the military service. However, in *Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9th Cir. 1968), *cert. denied,* 391 U.S. 951 (1968), where the alien's IV-C classification was also removed, but he was not inducted into the military service because, as in the instant case, he failed to pass the pre-induction physical, the court, refusing to extend *Hoellger,* held that the alien had been relieved from military service within the meaning of Section 315(a). We conclude that this court is bound by *Lapenieks,* and that, therefore, petitioner's first contention is without merit.

Secondly, petitioner contends that he signed the application for relief from military training and service under a misconception as to its legal consequences, in that he believed that by so doing he

would be permanently exempted from military
and he would not have signed the applicat
relief if he had known that the government r
the right to remove his exemption and call h
service; and that, therefore, he cannot be he
waiver of his right to become a citizen, citi
mainly relying upon *Moser v. United States,* 3
41 (1951).

In *Moser,* an alien applied for exemption fro
tary service, but, due to assurances made to
the Swiss legation and the U. S. State Departm
believed that he could do so without surrender
right to obtain U. S. citizenship. The Supreme
held that he was **[R.T. 79]** understandably lull
a misconception of the legal consequences of ap
for exemption and could not, therefore, be h
have waived his right to United States citizens

In the present case, petitioner testified that
he applied for exemption, he did not know th
government could later remove his exemptio
that, had he known this, he would not have a
for exemption. (R.T. of July 16, 1968 hearing
line 20 to p. 8, line 21). He has also testified
ever, that, when he signed the application for e
ion from military training and service, he kne
he would thereby become ineligible for United
citizenship. (Transcript of Preliminary Exam
by Naturalization Examiner, September 2, 19
7, 9). Therefore, unlike *Moser,* he was not lull
any misconception about the legal consequen
applying for exemption. Accordingly, the cour
that petitioner did knowingly relinquish his r

United States citizenship. *Moser* is therefore inapplicable, and petitioner's second contention is without merit.

Thirdly, petitioner contends that if he had been found physically fit, he would have served in the military and would now be eligible for citizenship under *United States v. Lacher, supra,* despite the fact that he was once relieved from service on the ground of alienage; and that to permit or deny citizenship on the basis of one's success in passing a military physical fitness test constitutes an unreasonable classification, violative of the due process clause of the Fifth Amendment.

No such claimed unreasonable classification is found in the statute itself, nor does it necessarily stem from the statute. Any such claimed unreasonable classification is **[R.T. 80]** merely the incidental result of the judicially declared rule of *Lapenieks* in this circuit, to the effect that upon facts similar to those in the pending case, an alien has been effectively relieved from service and is, therefore, ineligible for citizenship under Section 315(a). Therefore, petitioner's third contention is without merit.

Accordingly, it is the order of this Court that the petition for naturalization of Ib Otto Astrup be, and the same is, hereby denied.

Dated: November 14th, 1968.

/s/ W. T. Sweigert
United States District Judge **[R.T. 81]**

Filed November 15, 1968,
James P. Welsh, Clerk.

In the United States District Court for the Northern District of California

No. 168753

In re Petition for Naturalization of Ib Otto Astrup, Petitioner.

NOTICE OF APPEAL

Notice is hereby given that Ib Otto Astrup, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and order denying petitioner's petition for naturalization, entered in this action on the 15th day of November, 1968.

/s/ Paul N. Halvonik
Paul N. Halvonik
American Civil Liberties Union
503 Market Street, San Francisco
Attorney for Petitioner [R.T. 82]

Filed December 11, 1968,
James P. Welsh, Clerk.

United States Court of Appeals
For the Ninth Circuit

Ib Otto Astrup, Petitioner and Appellant, vs. Immigration & Naturalization Service, Appellee.	No. 23,859

[July 8, 1970]

On Appeal from the United States District Court for the Northern District of California

---

Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge.

Per curiam:

The decision and order of the district court denying citizenship to Astrup is affirmed. We believe that he is concluded by Lapenieks v. Immigration and Naturalization Service, 9 Cir., 389 F.2d 343, cert. den. 391 U.S. 951.

He made a considered decision initially to claim his alienage as a ground for avoiding military service. We believe the situation should be tested as of the time his claim was made.

Judge Plummer dissents for the reasons stated by Judge Duniway in his dissent in Lapenieks.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is: 562 Mission Street, San Francisco, California.

On March 4, 1971, I served the within

Appendix, "Astrup vs. Immigration and Naturalization Service, Department of Justice", in the Supreme Court of the United States; October Term, 1970, No. 840;

on the attorneys in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

Mr. Erwin N. Griswold, Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 4, 1971, at San Francisco, California.

M. J. Connolly

FILE COPY

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ROBERT SEAVER, CLE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, *Petitioner*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

PAUL N. HALVONIK,
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Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	5
1. Jurisdiction of the courts below	5
2. The petition of Ib Otto Astrup for naturalization	5
Reasons for granting the writ	6
A. This case presents an important and unsettled question of federal law	9
B. There is a conflict among the federal courts	9
C. The Ninth Circuit's interpretation of Section 315(a) suffers from a number of constitutional infirmities	10
D. Petitioner did not make a knowing waiver of his eligibility for citizenship	12
Conclusion	17

Table of Authorities Cited

Cases	Pages
Bolling v. Sharpe, 347 U.S. 497 (1954)	11
Ceballos v. Shaughnessy, 352 U.S. 599 (1957)	7, 9
In re Wendt, 300 F.Supp. 725 (N.D. Ill., E.D. 1969)	10
Lapenieks v. Immigration and Naturalization Service, 389 F.2d 343 (9 Cir. 1968), cert. den. 391 U.S. 951 (1968)	7, 8, 10, 13
Morey v. Doud, 354 U.S. 457 (1957)	11
Moser v. United States, 341 U.S. 41 (1951)	15, 16

Pages

Petition for Naturalization of Joseph Kadich, 221 F.Supp. 353 (S.D. N.Y. 1963) 10

Robinson v. California, 370 U.S. 660 (1962) 12

Trop v. Dulles, 356 U.S. 86 (1958) 7, 11, 12

United States v. Bazan, 228 F.2d 455 (D.C. Cir. 1955) 10

United States v. Hoellger, 273 F.2d 760 (2 Cir. 1960) 7, 8, 9, 14

United States v. Lacher, 299 F.2d 919 (9 Cir. 1962) ... 7, 8, 9, 11

Codes

28 U.S.C.A. Sec. 1254(1) 2

8 U.S.C. Sec. 1426(a) 4

28 U.S.C. Secs. 1291 and 1294 5

50 U.S.C. App. Sec. 454(a) (1950) 5

Constitutions

United States Constitution:

Fifth Amendment, Due Process Clause 3

Eighth Amendment 3, 4, 12

Statutes

Immigration and Nationality Act:

Section 315 ..... 2, 3, 4, 12

Section 315(a) 6, 7, 14

Section 316(a) 5

Selective Service Act of 1948:

Section 4(a) 4, 5, 6, 12, 13

Universal Military Training and Service Act:

Section 4(a) 13

65 U.S. Stats. 75 13

62 U.S. Stats. 604, 605-606 ..... 4, 12, 13

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

IB OTTO ASTRUP,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner Ib Otto Astrup, Appellant below, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming an Order of the District Court for the Northern District of California. The District Court's Order was one denying petitioner's Petition for Naturalization; the Court of Appeals affirmed, Judge Plummer dissenting.

OPINION BELOW

The decision of the Court of Appeals is not yet reported; it is printed as Appendix "A" to this Petition. The Memorandum of Decision of the District Court, which is unreported, is printed as Appendix "B" to this Petition.

JURISDICTION

1. The judgment sought to be reviewed was entered on July 8, 1970. The time for filing this petition has been, by order of Mr. Justice Douglas, extended from October 6, 1970 to October 16, 1970.

2. The statutory provision which confers jurisdiction on this Court to review the judgment in question is 28 U.S.C.A., sec. 1254(1).

3. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming the denial of Petitioner's Petition for Naturalization has decided an important question of federal law relating to eligibility for citizenship, which has not been, but should be, considered and settled by this Court.

QUESTIONS PRESENTED

1. Whether Section 315 of the Immigration and Nationality Act should be interpreted to mean that an alien who signed a request for exemption from military service under the impression that he would be permanently exempt from military service should be disbarred from citizenship notwithstanding the fact

that his draft exemption was removed by Congress and that consequently he would have served this country during the Korean War but for the fact that he did not pass his induction physical examination.

2. Whether Section 315 of the Immigration and Nationality Act, when interpreted by the courts to grant citizenship to those aliens who requested exemption from military service but were inducted into the Armed Forces while denying citizenship to similarly situated aliens who could not pass the physical examination, creates such an unreasonable classification that it violates the guarantee of due process of law.

3. Whether a denial of citizenship to an alien when he could not serve in the military because of a physical disability violates the Eighth Amendment's proscription of "cruel and unusual punishments."

4. Whether the signing of a request for relief from training and service in the armed forces, executed under the mistaken belief that it did in fact relieve one perpetually from military training and service, is a "knowing waiver" of eligibility for citizenship.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

Section 315 of the Immigration and Nationality Act, 8 U.S.C. section 1426(a):

"Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Section 4(a) of the Selective Service Act of 1948, 62 U.S. Stats. 604, 605-606:

"Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

STATEMENT OF THE CASE

1. Jurisdiction of the Courts Below.

This is an appeal from an order entered on November 15, 1968, by the United States District Court for the Northern District of California denying petitioner's Petition for Naturalization. The petition was brought under the provisions of Section 316(a) of the Immigration and Nationality Act. The District Court's jurisdiction was invoked under the provisions of said Act, and the Court of Appeals had jurisdiction in the case by virtue of 28 U.S.C. §§ 1291 and 1294.

2. The Petition of Ib Otto Astrup for Naturalization.

Petitioner was born in Denmark on November 23, 1926. On February 20, 1950 he was lawfully admitted to the United States for the purpose of permanent residence. In August of 1950 petitioner registered under the Selective Service Act of 1948 and in the following month, September 20, 1950, was classified I-A and ordered to report for induction. (R.T. 4, 77).

On November 14, 1950 petitioner, who had just completed a fourteen month tour of duty with the Danish Navy and was not certain that he wished to become a permanent United States resident, executed SSS Form 130, a request for exemption from military service on the ground of alienage, believing such exemption would be permanent. The next day he was reclassified IV-C. The IV-C classification (alien not currently liable for military service) was granted pursuant to §4(a) of the Selective Service Act of 1948 (50 U.S.C. App. §454(a)(1950)).

In 1951 Congress amended the Selective Service Act of 1948 so that §4(a) no longer provided the procedure for the exemption of resident aliens, and, on August 6, 1952, pursuant to that change, petitioner's draft board reclassified him I-A. Petitioner wound up his personal affairs and informed his employer that he was being drafted and would be gone for two years. But on September 2, 1952, he was examined and found not physically fit for military service. On November 24, 1952, his draft board reclassified him V-A (registrant over the age of liability for military service). (R.T. 4, 77-78).

In December 1952 the Immigration and Nationality Act of 1952 became effective. Section 315(a) of that Act, which the Appellate Court held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment occurred only if the alien applies or has applied for relief *and* "is relieved . . . on such ground."

On May 14, 1965 petitioner filed his petition for naturalization. (R.T. 1-2). The Immigration and Naturalization Service opposed the petition. The District and Appellate Courts found petitioner ineligible for citizenship.

REASONS FOR GRANTING THE WRIT

Petitioner seeks to become a citizen of the United States, where he has lived for twenty years. The significance of citizenship, and the consequences of its absence, have been eloquently described by this Court

in *Trop v. Dulles,* 356 U.S. 86 (1958) and there is no reason to reiterate its importance here. Suffice it to say that denial of citizenship, for no rational reason, is a grave injustice and that that is precisely what has happened here.

Petitioner did, true enough, execute a request for exemption from military service. But he was not actually relieved from military service because of the execution of the request and, but for the Ninth Circuit's decision in *Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9 Cir. 1968), *cert. den.,* 391 U.S. 951 (1968), his petition would surely have been granted under the rule of *United States v. Lacher,* 299 F.2d 919 (9 Cir. 1962). *Lacher,* consistent with the Second Circuit's decision in *United States v. Hoellger,* 273 F.2d 760 (2 Cir. 1960) and this Court's opinion in *Ceballos v. Shaughnessy,* 352 U.S. 599 (1957) held that section 315(a) contains a two-pronged test; that is to say, before one can be held to have forfeited all hope of becoming a citizen he must not only have applied for an exemption from military service but also have been effectively relieved of military obligations. Lacher had, like petitioner here, executed the request for exemption but had not been relieved from service. He had been drafted and inducted into the Armed Forces. *Lapenieks* presented a case identically factual to *Lacher* except for one feature: Lapenieks flunked the physical and, because of that difference, was denied citizenship. But surely flunking a physical is no reason for denying a person citizenship and although the *Lapenieks* Court gave

that as the reason for distinguishing the case from *Lacher* there was, as Judge Duniway emphasized in his thoughtful *Lapenieks* dissent (389 F.2d at 347), another underlying reason for distinguishing the cases. By postponing his induction Lapenieks managed to avoid the Korean conflict and would not have served in time of war even had he passed the physical. Petitioner, on the other hand, did, like Lapenieks, flunk his physical but, unlike Lapenieks, petitioner, had he passed, would have served during the Korean conflict. But since petitioner flunked his physical and since the reason given for the distinction between *Lacher* and *Lapenieks* was that the former had passed his physical, petitioner's was deemed a *Lapenieks* case. Accordingly, petitioner has been denied citizenship pursuant to the dead hand of a tortured precedent dictated by emotions inapplicable to petitioner's case. No Court has suggested that the result is reasonable or that denying petitioner citizenship can rationally be justified. The District Court simply held that "this court is bound by *Lapenieks*" (Appendix B, p. vi) and the Court of Appeals disposed of the case with a one-page decision citing *Lapenieks* (Appendix A).

We do not know how many persons are in a position similar to petitioner's. The recitation of cases contained in the appendix to *United States v. Hoellger,, supra,* 273 F.2d, 764-766 suggests that not an inconsiderable number of people are being deprived of citizenship pursuant to a rule that has no support in reason and is inconsistent with the language of this

Court's *Ceballos* decision. This case is thus an important one and raises issues that, we respectfully urge, should be resolved by this Court. We now turn to those issues.

A. THIS CASE PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW

This case presents an important question of federal law concerning the nature of eligibility for citizenship which has not been settled by this Court. In *Ceballos v. Shaughnessy,* 352 U.S. 599, 601 (1957) this Court ruled that "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for exemption,' and also one who 'is or was relieved or discharged from such training or service on such ground.'" But this Court has not decided whether the sort of "exemption" afforded this petitioner—the mere temporary granting of exemption followed by its withdrawal—constitutes "relief" within the meaning of the two-pronged requirement.

B. THERE IS A CONFLICT AMONG THE FEDERAL COURTS

A clear conflict exists among the Circuit Courts of Appeals and among the District Courts. In *United States v. Hoellger,* 273 F.2d 760 (2 Cir. 1960) and in *United States v. Lacher,* 298 F.2d 919 (9 Cir. 1962) citizenship was granted subsequent to an exemption based on alienage because the petitioners in those

cases had passed the induction physical examination and served in the armed forces. In *United States v. Bazan* 228 F.2d 455 (D.C. Cir. 1955) (per curiam) citizenship was granted even though the alien had applied for an exemption and was not inducted. But in *Lapenieks v. Immigration and Naturalization Service,* 382 F.2d 723 (9 Cir. 1968) and in this case citizenship was denied.

Furthermore, it is clear that if petitioner had appealed the administrative decision to the District Courts of New York or Illinois, where aliens have been granted citizenship in circumstances legally identical to those of this petitioner, he would now be naturalized. See, *Petition for Naturalization of Joseph Kadich,* 221 F.Supp. 353 (S.D.N.Y. 1963); *In re Wendt,* 300 F.Supp. 725 (N.D. Illinois, E.D. 1969).

Where a question as fundamental as eligibility for citizenship is at issue, the exercise of this Court's certiorari jurisdiction is fully justified to the end that a uniform and orderly rule of eligibility develop. A judgment that is dictated by geography is manifestly an unfair decision.

C. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 315(a) SUFFERS FROM A NUMBER OF CONSTITUTIONAL INFIRMITIES

a. The rule which obtains in the Ninth Circuit is predicated on an irrational classification in which an applicant's ability to pass a military physical examination is the determining factor in his eligibility for

citizenship. The effect of the Ninth Circuit's rule is that an alien who passes a physical examination and serves in the Armed Forces during a time when this country is at peace is granted naturalization (*United States v. Lacher*) while the alien who would have served during the Korean War (had he passed his physical examination) is denied naturalization.

The federal government, no less than the state government, is precluded from making irrational classifications. *Bolling v. Sharpe,* 347 U.S. 497 (1954). And "a statutory classification must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud,* 354 U.S. 457, 465 (1957) (footnote omitted). There is no conceivable relationship between the ability to pass a Selective Service physical and the ability to be a good citizen.

b. Barring petitioner from citizenship because of his physical disability also violates the Eighth Amendment to the United States Constitution. Denial of citizenship is "punishment" within the meaning of the Amendment's proscription of "cruel and unusual punishments." A statute is considered nonpenal only if its imposition of a disability is not punitive but designed to accomplish some other legitimate purpose, *Trop v. Dulles,* 356 U.S. 86, 96 (1958). The only reason for denying citizenship to petitioner is a punitive one (no one contends he would not make a good citizen) and, but for his illness, he would have passed his physical examination, served in the Armed Forces and become a citizen. Petitioner is being punished for

his failure to pass a physical examination and punishing a person because of his illness has been explicitly held to violate the Eighth Amendment. *Robinson v. California,* 370 U.S. 660 (1962). In that case this Court noted that imprisonment for but one day for the crime of having a common cold would constitute cruel and unusual punishment; here petitioner is punished for the remainder of his life.

c. A third constitutional problem emerges because §315 permits the military to become the arbiter of citizenship. Justices Douglas and Black, concurring in *Trop v. Dulles,* observed that "nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen." (356 U.S. at 105). If the military does not have such control when the individual in question has committed the crime of desertion, then clearly it should have no control over citizenship when the individual has committed no crime save to be physically unacceptable to the Armed Forces.

D. PETITIONER DID NOT MAKE A KNOWING WAIVER OF HIS ELIGIBILITY FOR CITIZENSHIP

Petitioner signed the "Application By Alien For Relief From Training And Service In The Armed Forces" on November 14, 1950. The application provided that: "I hereby apply for relief from liability and training in the armed forces of the United States." (R.T. 74). That wording was consistent with §4(a) of the Selective Service Act of 1948, 62 U.S.

Stats. 604, 605-606.[1] That law provided, in pertinent part:

> "Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

Petitioner signed the application for relief because he had only been in the country for nine months, had not yet made up his mind whether he wanted to become a permanent resident and because he had just completed a tour of duty in the Danish Navy. (J.R.T. 7).[2]

In June of 1951, however, Congress passed the Universal Military Training and Service Act, 65 U.S. Stats. 75, which provided, in §4(a), that relief from military training was available only to those aliens who have "remained in the United States in a status other than of a permanent resident for a period ex-

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[1]In *Lapenieks v. Immigration and Naturalization Service, supra,* treaty rights were involved. There are no pertinent treaty, obligations between the United States and Denmark and this petitioner, in claiming exemption from the draft, was relying exclusively on rights created by the statutes of the United States.

[2]J.R.T. refers to the Reporter's Transcript of the hearing of July 16, 1968.

ceeding one year. . . ." It was this provision that resulted in the removal of petitioner's "relief from liability." And it was on the basis of this provision that, on August 6, 1952, petitioner's local board reclassified him I-A and, twelve days thereafter, order him to report for induction into the armed services. Petitioner reported as ordered but was found physically unfit for the service. The determination that petitioner was physically unfit came as a surprise to him; he had wound up his personal affairs expecting that he would be gone for a period of two years. (J.R.T. 9). In December of 1952, the Immigration and Nationality Act of 1952 became effective. Section 315(a) of that Act, which the District and Appeals Courts held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment only occurred if the alien applies or has applied for relief *and* "is relieved . . . on such ground." Thus it was §315(a) that introduced the "two-pronged" requirement.

Petitioner can hardly be held to a standard of clairvoyance that would require him to anticipate the Acts of Congress of 1951 and 1952 which removed his relief from services in the armed forces. As Judge Moore observed in his concurring opinion in *United States v. Hoellger, supra,* 273 F.2d at 766:

> "Appellee fully understood the consequences of his election in claiming draft exemption. He traded ineligibility to become a citizen against relief from service—not a mere temporary stay or deferment subject to cancellation. However, the government's part of the bargain was that he be

> relieved from service. When the government by its own Act destroyed Hoellger's exempt status by changing its arrangements with Germany, thereby making its national subject to service in our armed forces and thereafter compelled him to serve, it took away the consideration for the original bargain. Because the government deprived Hoellger of that which it represented to him would be granted, it is in no position to insist upon enforcement of citizenship ineligibility, the price he was paying for that which he did not receive."

Petitioner signed the application for relief under a misconception as to its legal consequences. Under the rule of "elementary fairness" announced in *Moser v. United States,* 341 U.S. 41 (1951), petitioner cannot be held to have waived his right to become a citizen.

In *Moser* the alien applying for exemption from military service believed he could do so without surrendering his right to obtain United States citizenship. This belief was encouraged by advice from the Swiss legation and the United States State Department. Moser testified that had he known that claiming the exemption would debar him from citizenship, he would not have claimed it. (341 U.S. at 45). This Court held that these facts "understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption." (341 U.S. at 46) (emphasis in original). This Court ordered Moser admitted to citizenship.

In the immediate case petitioner was similarly misled; he misconceived the legal consequences of

his act. He believed as anyone reading the application he signed would believe (see R.T. 74),[3] that in exchange for the forfeiture of his right to become a United States citizen he would, in return, be permanently exempted from military duty (see J.R.T. 7-8). Petitioner would never have executed the application had he not been misled and is accordingly entitled to rely upon the rule of elementary fairness limned in *Moser*.

The District Court held *Moser* inapplicable, reasoning that petitioner knew he would be relinquishing his right to citizenship and had not been misled as to that fact. (Appendix B, p. vii). But the District Court's analysis, with all respect, misses the point; it gives a rule of "elementary fairness" a tortured and grudging reading. What *Moser* holds is that one cannot be held to a surrender of a right as significant as becoming an American citizen when that surrender was done under a government induced misapprehension of fact. That is precisely what happened here. The government neglected to inform petitioner that the "exemption" extended to him was illusory, good only for so long as the government wished it to be good. Instead the government misled him into believing he was signing a release from "liability," a release that did not in fact preclude his liability.

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[3]The application explicitly states that one executing it "shall be relieved from *liability*" (emphasis added). Relief from "liability" connotes removal of obligation, an extinguishment rather than postponement of responsibility.

CONCLUSION

A Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be issued, so that the Court's judgment affirming the judgment of the District Court on the question of petitioner's eligibility for citizenship may be reviewed.

Dated, San Francisco, California,
October 2, 1970.

Respectfully submitted,
PAUL N. HALVONIK,
MARSHALL W. KRAUSE,
By PAUL N. HALVONIK,
American Civil Liberties Union
of Northern California,
Attorneys for Petitioner.

(Appendices Follow)

Appendix "A"

United States Court Of Appeals
For The Ninth Circuit

No. 23,859

Ib Otto Astrup, Petitioner and Appellant, vs. Immigration & Naturalization Service, Appellee.	}

[July 8, 1970]

On Appeal from the United States District Court for the Northern District of California

---

Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge.

Per curiam:

The decision and order of the district court denying citizenship to Astrup is affirmed. We believe that he is concluded by Lapenieks v. Immigration and Naturalization Service, 9 Cir., 289 F.2d 343, cert. den. 391 U.S. 951.

He made a considered decision initially to claim his alienage as a ground for avoiding military service.

We believe the situation should be tested as of the time his claim was made.

Judge Plummer dissents for the reasons stated by Judge Duniway in his dissent in Lapenieks.

Appendix "B"

United States District Court
Northern District of California

No. 168753

In Re Petition For Naturalization
of
Ib Otto Astrup

MEMORANDUM OF DECISION

This petition for naturalization, brought by Ib Otto Astrup, a native and national of Denmark, is apposed by the Immigration and Naturalization Service.

On July 16, 1968 a hearing was held before this court, oral testimony was taken, and the matter submitted on briefs by both parties.

The undisputed facts of the case are substantially as follows:

On February 20, 1950 petitioner was admitted to the United States for permanent residence. On August 20, 1950 he registered with the Selective Service System. On November 14, 1950 he signed an "Application by Alien for Relief from Training and Service in the Armed Forces." On November 15, 1950, pursuant to Section 4(a) of the Selective Serv-

ice Act of 1948 (50 U.S.C. App. §454(a) (1950)), which provided an exemption from military training and service for aliens, his draft board classified him IV-C (alien not currently liable for military service). In 1951 Congress amended the Selective Service Act of 1948 so that Section 4(a) no longer provided a procedure for the exemption of resident aliens, and on August 6, 1952, pursuant to said change, petitioner's draft board re-classified him I-A (available for military service). On August 18, 1952 it ordered him to report for induction. On September 2, 1952 he was examined and found not physically fit for military service, and on November 24, 1952 his draft board reclassified him V-A (registrant over the age of liability for military service). On May 14, 1965 he filed the pending petition for naturalization.

The Immigration and Naturalization Service opposes this petition on the ground that petitioner is ineligible for citizenship by reason of having applied for and received exemption from military service within the meaning of Section 315(a) of the Immigration and Nationality Act (8 U.S.C. § 1426 (a)), which provides:

> "Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Petitioner contends that for three reasons he is not ineligible for citizenship under Section 315(a).

First, he contends that he agreed to become permanently barred from obtaining United States citizenship in return for exemption from military training and service; that the government, by thereafter removing his exemption, failed to keep its part of the bargain; and that, therefore, he should not be bound to keep his part, citing and mainly relying upon the concurring opinion of Judge Moore in *United States v. Hoellger,* 273 F.2d 760, 766 (2d Cir. 1960).

Hoellger held that an alien whose IV-C classification had been removed by the draft because of the abrogation of treaty arrangements with Germany, under which he had been exempted from military service, and who was thereupon inducted into the military service, had not been relieved from service within the meaning of Section 315(a). The Court of Appeals for this circuit adopted *Hoellger* in *United States v. Lacher,* 299 F.2d 919 (9th Cir. 1962), where similarly, the alien's IV-C classification was removed, and he was inducted into the military service. However, in *Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9th Cir. 1968), *cert. denied,* 391 U.S. 951 (1968), where the alien's IV-C classification was also removed, but he was not inducted into military service because, as in the instant case, he failed to pass the pre-induction physical, the court, refusing to extend *Hoellger,* held that the alien had been relieved from military service within

the meaning of Section 315(a). We conclude that this court is bound by *Lapenieks,* and that, therefore, petitioner's first contention is without merit.

Secondly, petitioner contends that he signed the application for relief from military training and service under a misconception as to its legal consequences, in that he believed that by so doing he would be permanently exempted from military service, and he would not have signed the application for relief if he had known that the government retained the right to remove his exemption and call him for service; and that, therefore, he cannot be held to a waiver of his right to become a citizen, citing and mainly relying upon *Moser v. United States,* 341 U.S. 41 (1951).

In *Moser,* an alien applied for exemption from military service, but, due to assurances made to him by the Swiss legation and the U.S. State Department, he believed that he could do so without surrendering his right to obtain U.S. citizenship. The Supreme Court held that he was understandably lulled into a misconception of the legal consequences of applying for exemption and could not, therefore, be held to have waived his right to United States citizenship.

In the present case, petitioner testified that, when he applied for exemption, he did not know that the government could later remove his exemption and that, had he known this, he would not have applied for exemption. (R.T. of July 16, 1968 hearing, p. 7, line 20 to p. 8, line 21). He has also testified, however, that, when he signed the application for exemp-

tion from military training and service, he knew that he would thereby become ineligible for United States citizenship. (Transcript of Preliminary Examination by Naturalization Examiner, September 2, 1966, pp. 7, 9). Therefore, unlike *Moser,* he was not lulled into any misconception about the legal consequences of applying for exemption. Accordingly, the court finds that petitioner did knowingly relinquish his right to United States citizenship. *Moser* is therefore inapplicable, and petitioner's second contention is without merit.

Thirdly, petitioner contends that if he had been found physically fit, he would have served in the military and would now be eligible for citizenship under *United States v. Lacher, supra,* despite the fact that he was once relieved from service on the ground of alienage; and that to permit or deny citizenship on the basis of one's success in passing a military physical fitness test constitutes an unreasonable classification, violative of the due process clause of the Fifth Amendment.

No such claimed unreasonable classification is found in the statute itself, nor does it necessarily stem from the statute. Any such claimed unreasonable classification is merely the incidential result of the judicially declared rule of *Lapenieks* in this circuit, to the effect that upon facts similar to those in the pending case, an alien has been effectively relieved from service and is, therefore ineligible for citizenship under Section 315(a). Therefore petitioner's third contention is without merit.

Accordingly, it is the order of this Court that the petition for naturalization of Ib Otto Astrup be, and the same is, hereby denied.

Dated: November 14th, 1968.

W. T. Sweigert
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 432 F. 2d 438. The memorandum decision of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including October 16, 1970. The petition was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a), provides:

> Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

QUESTION PRESENTED

Whether a resident alien who applied for and received an exemption from military service as an alien, knowing that this rendered him permanently ineligible for United States citizenship, remains ineligible to become a citizen of the United States, even though the exemption was withdrawn by the United States and the alien presented himself for induction but was rejected as physically unfit.

STATEMENT

Petitioner, a native and citizen of Denmark, filed a petition for naturalization in the United States District Court for the Northern District of California. The Immigration and Naturalization Service opposed the petition on the ground that petitioner was ineligible for citizenship, having applied for and received exemption from military service within the meaning of Section 315(a) of the Immigration and Nationality

Act, 8 U.S.C. 1426(a). On November 14, 1968, the district court denied the petition for naturalization (Pet. App. B). The court of appeals affirmed the judgment on the basis of its prior decision in *Lapenieks* v. *Immigration and Naturalization Service,* 389 F. 2d 343 (C.A. 9), certiorari denied, 391 U.S. 951.

The facts are undisputed. Petitioner entered the United States for permanent residence on February 20, 1950. On August 20, 1950, he registered with the Selective Service System. He was thereafter classified I–A (available for military service) and ordered to report for induction. On November 14, 1950, he executed an "Application by Alien for Relief from Training and Service in the Armed Forces" (SSS Form 130), requesting exemption from military service on the ground of alienage. At the time he signed the application for exemption from military service, he knew that he would thereby become permanently ineligible for United States citizenship. On November 15, 1950, pursuant to Section 4(a) of the Selective Service Act of 1948, 50 U.S.C. (1950 Supp.) App. 454(a), his draft board classified him IV–C (alien not currently liable for military service).

In 1951, Congress amended the Selective Service Act of 1948 to eliminate from Section 4(a) the provision under which permanent resident aliens could elect to obtain exemption from military service on the ground of alienage. Pursuant to the amended statute, petitioner's draft board reclassified him I–A on August 6, 1952, and he was ordered to report for induction. On September 2, 1952, he was examined and found not physically qualified for military service.

On November 24, 1952, he was reclassified V-A (over age of liability for military service).

DISCUSSION

Petitioner contends that he was not "relieved" from military service, within the meaning of the citizenship disqualification set forth in Section 315(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1426(a)), because his alien exemption was subsequently withdrawn by amendment of the Selective Service Act the next year. He argues that he was thereafter subject to military service, and thus was "relieved" only because he failed to pass the physical examination. The petition argues that the statute should accordingly not be construed to disqualify petitioner and that, if it is so construed, it is unconstitutional.

The issue raised by the petition is identical with that raised in *Lapenieks* v. *Immigration and Naturalization Service,* 389 F. 2d 343 (C.A. 9), in which certiorari was denied in the 1967 Term (No. 1305, 391 U.S. 951). Nonetheless, upon reflection we now believe that the statutory construction for which he contends may have some basis. Although petitioner was for a time relieved from military service under his application for an alien exemption in which he knowlingly relinquished any claim to citizenship, it is true that he unexpectedly lost the continuing benefit for which he made that relinquishment and it was only the supervening factor of unfitness that finally kept him from service. The election made in 1950 was

undoubtedly induced by the statute then in force. [redacted]. When the government terminated its part of that arrangement by actually calling petitioner for service after the repeal of the statute in 1951—as it undoubtedly had power to do—it may be that the petitioner's election fell. It is not clear that Congress intended Section 315(a) to apply with all its rigor in these circumstances.

1. There are, however, arguments to the contrary. Petitioner might not have been found unfit for service in 1950, when he asserted his alien exemption; if, as is possible, the disqualifying physical condition detected in 1952 developed between 1950 and 1952, the short-lived alien exemption did in fact afford him in practical effect a permanent exemption from the draft. And application of Section 315 here could well be justified on the simple principle that petitioner should be held to the knowing choice he made in 1950. See *Ceballos* v. *Shaughnessy*, 352 U.S. 599 (upholding the disqualification established in different terms under the Selective Service Act of 1940); cf. *Brady* v. *United States*, 397 U.S. 742, 757.[1]

2. Although petitioner asserts a conflict in circuits (Pet. 9–10), in fact the decision below is in accord with that of every court of appeals which has passed upon the question here presented. *In re Naturalization of Cuozzo*, 235 F. 2d 184 (C.A. 3); *United States* v.

[1] *Moser* v. *United States*, 341 U.S. 41, relied on by petitioner, is distinguishable. The courts there made the express finding that Moser signed the application for exemption believing he was not precluded from citizenship, and that had he known of this consequence, he would have elected to serve in the armed forces. *Id.* at 45.

Kenny, 247 F. 2d 139 (C.A. 2); *In re Skender's Petition*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931. The decisions relied upon by petitioner (*United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2), *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9), and *United States* v. *Bazan*, 228 F. 2d 455 (C.A. D.C.)), are based on different facts. Except for *Bazan*, the aliens in these cases actually served in the armed forces after the withdrawal of their exemptions; under such circumstances a court could reasonably find that they had not been effectively relieved from military service by their claims of exemption.[2] In *Bazan*, the alien attempted on his own to withdraw an application for an exemption about a year after it was filed. The court upheld a grant of citizenship on the ground that, although the record showed that he had made the application, *no* evidence was before the court to establish that he was relieved from service for that reason. No such deficiency exists in the instant record. In 1950, petitioner was actually classified I–A and ordered to report for induction, and his

[2] Indeed in *Hoellger*, *supra*, the court expressly stated in dictum: "An alien who postpones induction by means of application for exemption, and who is thereafter rejected for physical disability, may legitimately be said to have been relieved from military service by virtue of his exemption application." 273 F. 2d at 763 n. 2.

application for exemption as an alien terminated that order.[8]

3. Petitioner's constitutional arguments are, we believe, without merit. The statute, if construed against him, simply disqualifies from citizenship all aliens who have knowingly utilized their alienage to obtain relief from military service. An exception has been recognized for those who have actually served in the armed forces after the withdrawal of the exemption, but there is no constitutional principle of equal protection that requires a similar exception to be established for an alien who has received some benefit from the former exemption and has not in fact served in the military.

Nor would such statutory ineligibility for citizenship amount to any form of "punishment", "cruel and unusual" or otherwise. Naturalization is a privilege that the sovereign may reasonably confer, withhold or qualify, and an alien may claim it as of right only upon compliance with the terms which Congress imposes. *United States* v. *MacIntosh*, 283 U.S. 605,

[8] The district court cases cited by petitioner are also distinguishable. *In re Wendt*, 300 F. Supp. 725 (N.D. Ill.), held that where the alien was overage at the time he claimed exemption and a member of the draft board testified that he would not have been called because of his age even if classified I-A, he was *effectively* relieved of service by board policy rather than by his signing the alien exemption form. *Id.* at 727. In *In re Kadich*, 221 F. Supp. 353 (S.D.N.Y.), the alien exemption was granted by mistake and withdrawn by the Government as soon as it was discovered; the court held that under these circumstances, his exemption, effective for a period of time, did not bar citizenship even though he was subsequently ordered to report for induction and rejected as psychoneurotic.

615, and *United States* v. *Schwimmer*, 279 U.S. 644, both cases overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61. The burden is on the alien to bring himself within the statute and doubts are to be resolved in favor of the United States and against the claimant. See *Berenyi* v. *District Director*, 385 U.S. 630.

The fact that decisions made in the course of the military induction process concerning eligibility for service in the armed forces may affect eligibility for citizenship does not make the military an arbiter of citizenship. *Trop* v. *Dulles*, 356 U.S. 86, cited by petitioner, dealt with statutory *removal* of citizenship for desertion. Here the fact of service merely removes the bar created by the alien's deliberate decision to waive citizenship in order to avoid service.

CONCLUSION

We do not formally oppose the petition for a writ of certiorari in this case, but we have deemed it appropriate to point out some of the factors pertinent to the Court's disposition of the petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, *Petitioner*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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Subject Index

	Page
Statement of the case	1
Opinion below	3
Jurisdiction	3
Questions presented	3
Constitutional and statutory provisions involved	4
Summary of argument	6
Introduction	10
The historical background	12
(A) Pre-1917	12
(B) Alien conscription and the first world war	14
(C) The Act of 1940	18
(D) The Act of 1948	19
(E) The Act of 1951	20
Argument	21
I	
Section 315 of the 1952 Act provides a two-pronged test; one forever forfeits an opportunity for citizenship only when: (A) he applies for exemption from military service *and* (B) he is effectively relieved from military service by virtue of his application for exemption	21
II	
Petitioner, since he was misled as to the nature of the bargain, did not make a knowing waiver of his eligibility for citizenship	26
III	
The constitutional issues	31
(A) Due process and the denial of citizenship to aliens because they fail to pass a physical examination	35
(B) Denying citizenship because of the failure to pass a physical examination is cruel and unusual punishment	37
Conclusion	38

Table of Authorities Cited

Cases

	Pages
Bolling v. Sharpe, 347 U.S. 497 (1954)	36
Cannon v. United States, 288 F.2d 269 (2 Cir. 1961)	24
Ceballos v. Shaughnessy, 352 U.S. 599 (1957)	23, 25
Delgadillo v. Carmichael, 332 U.S. 388 (1947)	34, 36, 37
Duckworth v. Arkansas, 314 U.S. 390 (1941)	32
Gonzales v. Landon, 350 U.S. 920 (1955) (per curiam)	36
Greene v. McElroy, 360 U.S. 474 (1959)	34
In re Bouchage's Petition, 177 F.Supp. 887 (S.D. N.Y. 1959)	31
In re Carlson, 730-P 259786 (D. Ill. 1942)	17
In re Gustavson, 300 F.2d 251 (S.D. Cal. 1924)	37
In re Kaufmann's Naturalization, 394 Pa. 625, 148 A.2d 925 (1959)	26
In re Petition for Naturalization of Fabbri, 254 F.Supp. 858 (E.D. Mich. 1966)	25, 26
In re Rego's Petition, 289 F.2d 174 (3 Cir. 1961)	23, 24, 25, 37
In re Siem, 284 F. 868 (D. Mont. 1922), aff'd 299 F. 589 (9 Cir. 1924)	28
In re Urmenta, 42 F.Supp. 138 (D. Wis. 1941)	18
In re Wendt, 300 F.Supp. 725 (N.D. Ill. 1969)	25
Kawakita v. United States, 343 U.S. 717 (1952)	25
Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967)	33
Lapenieks v. Immigration and Naturalization Service, 389 F.2d 343 (9 Cir. 1968), cert. denied 391 U.S. 951	26, 31
Mannerfrid v. United States, 200 F.2d 730 (2 Cir. 1952), cert. denied 354 U.S. 918	30
McGrath v. Kristensen, 340 U.S. 162 (1950)	18
Morey v. Doud, 354 U.S. 457 (1957)	36
Moser v. United States, 341 U.S. 41 (1951)	8, 29, 30, 31
Perkins v. Elg, 307 U.S. 325 (1939)	25
Petition for Naturalization of Joseph Kadich, 221 F.Supp. 353 (S.D. N.Y. 1963)	26
Petition of Caputo, 118 F.Supp. 870 (E.D. N.Y. 1954)	26
Petition of Kohl, 146 F.2d 347 (2 Cir. 1945)	24

Pages
Petition of Otness, 49 F.Supp. 220 (N.D. Cal. 1943).....17, 18
Petition of Tsuji, 119 F.Supp. 68 (N.D. Cal. 1953)..... 17

Robinson v. California, 370 U.S. 660 (1962)..... 37

Sherbert v. Verner, 374 U.S. 398 (1963)..... 33
Staten Island Hygenia Ice and Cold Storage Co. v. United States, 85 F.2d 68 (2 Cir. 1936)..... 28

Terrace v. Thompson, 263 U.S. 197 (1923)..... 34
Trop v. Dulles, 356 U.S. 86 (1958)..... 37
Tutun v. United States, 12 F.2d 763 ((1 Cir. 1926)..... 16

United States v. Bazan, 97 U.S. App. D.C. 108, 228 F.2d 455 (D.C. Cir. 1955) (per curiam)..... 25
United States v. Hoellger, 273 F.2d 760 (2 Cir. 1960)....24, 28
United States v. Lacher, 299 F.2d 919 (9 Cir. 1962).....
.....23, 24, 31, 36, 37
United States v. MacIntosh, 283 U.S. 605 (1931)..... 32

Wong Wing v. United States, 163 U.S. 228 (1896)..... 36

Congressional Documents

Hearings before the House Committee on Military Affairs, 65th Cong., 1st Sess. 1917, pp. 4, 10 (S.J. Res. 84)..... 14

House Immigration Committee Hearings on H.R. 9416, Part 2, p. 25 17

House Immigration Committee Hearings on H.R. 10010, 66th Cong., 1st Sess., pp. 63, 65, 70 17

Senate Report 394, 77 Cong., 1st Sess. 18

Constitutions

United States Constitution:
Fifth Amendment, Due Process Clause 4, 36
Eighth Amendment 4, 5, 9, 37
Article I, Section 8 32

Orders

Executive Order No. 9992 (32 C.F.R. 622.18; Federal Register, August 30, 1948) 20

Statutes

Pages

1941 Public Law 360 18

Public Law 360, Section 3(a) 19

1961 Public Law 87-143 20

12 Stat. L. 731 (1863) 12

13 Stat. L. 732 (1863) 13

Spanish American War Act (30 Stat. L. 361 (1898)) 13

Ch. 179, Section 2, 28 Stat. L. 216 (1894) 20

Act of May 18, 1917 (40 Stat. L. 76, Section 2) 14, 16

40 Stat. L. 885 (1918) 16

46 Stat. L. 1931 17

54 Stat. L. 885 18

Nationality Act of 1940 (54 Stat. L. 1172) 17

55 Stat. L. 844 (1941) 18, 19

59 Stat. L. 551 (1945) 19

Section 4(a), Selective Service Act of 1948 (62 Stat. L. 604, 605-606) 1, 2, 5, 19, 21, 26

Section 4(a), Universal Military Training and Service Act of 1951 (65 Stat. L. 75, 76) 2, 5, 11, 20, 22, 23, 27, 28

8 U.S.C. Section 224(c) 19

Section 315, Immigration and Nationality Act (8 U.S.C. Section 1426(a) ..... passim

10 U.S.C. Section 325(3)(c) 20

28 U.S.C. Section 1254(1) 3

Texts

Borchard, Diplomatic Protection of Citizens Abroad (1915) 12, 14

Fitzhugh and Hyde, The Drafting of Neutral Aliens by the United States, 36 Am.J.Int.L. 369 (1942) 14

Pages

III Hackworth, Digest of International Law (1942)..... 14

2 Hyde, International Law (1922) 14

4 Moore, International Law Digest (1906) 12, 13

Loessler, Rights and Duties of Declarant Aliens, 91 U. of Pa. Law Rev. 321 (1942) 14

1 Oppenheim, International Law (Lauterpact's 5th Ed., 1937) 14

Vattel, Law of Nations (1859) 14

Miscellaneous

H.R. 9416 (66th Cong., 1st Sess., 1919) 16, 17

Interpretation 1 of the Immigration Service, June 5, 1941 17

Letter to Senator Reynolds, Chairman, Committee on Military Affairs, May 23, 1941 18

Second Report of the Provost Marshal General, p. 98 (1919) 14

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Petitioner was born in Denmark on November 23, 1926. On February 20, 1950 he was lawfully admitted to the United States for the purpose of permanent residence. In August of 1950 petitioner registered under the Selective Service Act of 1948 and in the following month, September 20, 1950, was classified I-A and ordered to report for induction. (A. 8-9, 44).

On November 14, 1950, petitioner executed SSS Form 130, a request for exemption from military

service on the ground of alienage, believing such exemption would be permanent. At the time petitioner requested exemption he was not certain he wished to stay in the United States. He had come here after a fourteen month tour with the Danish Navy, had been the sole support of his mother for the preceding three years, and was seriously considering returning to Denmark. (A. 27-30).

The day after petitioner signed form 130 he was reclassified IV-C. The IV-C classification (alien not currently liable for military service) was granted pursuant to §4(a) of the Selective Service Act of 1948. 62 Stat.L. 604 (1948).

In 1951 Congress amended the Selective Service Act of 1948 so that §4(a) no longer provided the procedure for the exemption of resident aliens (65 Stat.L. 75) and, on August 6, 1952, pursuant to that change, petitioner's draft board reclassified him I-A. Petitioner was ordered to report for induction on August 18, 1952. Petitioner wound up his personal affairs and informed his employer that he was being drafted and would be gone for two years. But on September 2, 1952, he was examined and found not physically fit for military service. On November 24, 1952, his draft board reclassified him V-A (registrant over the age of liability for military service). (A. 9, 44-45).

In December 1952 the Immigration and Nationality Act of 1952 became effective. §315(a) of that Act, which the Appellate Court held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment occurred

only if the alien applies or has applied for relief *and* "is relieved . . . on such ground."

On May 14, 1965 petitioner filed his petition for naturalization. (A. 5-6). The Immigration and Naturalization Service opposed the petition. The District and Appellate Courts found petitioner ineligible for citizenship.

OPINION BELOW

The decision of the Court of Appeals is reported at 432 F.2d 438 and at A. 49. The Memorandum of Decision of the District Court, which is unreported, is reproduced at A. 43-47.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1). The judgment of the Court of Appeals was entered on July 8, 1970. The petition for writ of certiorari was filed on October 12, 1970 and was granted on January 18, 1971.

QUESTIONS PRESENTED

1. Whether Section 315 of the Immigration and Nationality Act should be interpreted to mean that an alien who signed a request for exemption from military service under the impression that he would be permanently exempt from military service should

be disbarred from citizenship notwithstanding the fact that his draft exemption was removed by Congress and that consequently he would have served this country during the Korean War but for the fact that he did not pass his induction physical examination.

2. Whether the signing of a request for relief from training and service in the armed forces, executed under the mistaken belief that it did in fact relieve one perpetually from military training and service, is a "knowing waiver" of eligibility for citizenship.

3. Whether Section 315 of the Immigration and Nationality Act, when interpreted by the courts to grant citizenship to those aliens who requested exemption from military service but were inducted into the Armed Forces while denying citizenship to similarly situated aliens who could not pass the physical examination, creates such an unreasonable classification that it violates the guarantee of due process of law.

4. Whether a denial of citizenship to an alien when he could not serve in the military because of a physical disability violates the Eighth Amendment's proscription of "cruel and unusual punishment."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

Section 315 of the Immigration and Nationality Act, 8 U.S.C. section 1426(a):

"Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Section 4(a) of the Selective Service Act of 1948, 62 Stat.L. 604, 605-606:

"Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

Section 4(a) of the Universal Military Training and Service Act of 1951, 65 Stat.L. 75, 76:

". . . every male alien admitted for permanent residence . . . shall be liable for training and

service in the Armed Forces. . . . *Provided further,* That any male alien . . . who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States."

SUMMARY OF ARGUMENT

Petitioner came to this country in 1950 and, during that same year, applied for exemption from military service. He was informed that by doing so he would be forever debarred from citizenship. But he was also informed that, in exchange for relinquishing the opportunity to become a citizen, he would receive release from liability in the military service.

In the Introduction to our Argument we demonstrate that the bargain struck between the government and petitioner was a traditional one with a history extending to the Civil War. From the time of the Civil War through 1950 it was recognized that military service was a citizen-responsibility; neutral

aliens were not conscriptable. Aliens taking advantage of their non-conscriptable status were forever barred from citizenship but, because they could not acquire the benefits of citizenship, they were also forever relieved of the supreme obligation of citizenship: military service.

In 1951, however, Congress, in a drastic departure from previous law, made permanent resident aliens conscriptable. Petitioner, in spite of his agreement with the government, became liable for military service, was in fact drafted and would have served in the armed forces but for his inability to pass the induction physical. Petitioner willingly submitted to induction because, since 1950, he had decided to make the United States his home and was not at all adverse to shouldering the responsibilities of citizenship.

By conscripting aliens under the law of 1951, Congress had failed to meet its half of the bargain it had made with thousands of aliens. The simple application for alien-exemption was supposed to fulfill two purposes: (a) forever debar the alien from citizenship, and (b) forever release the alien from military obligation. The applications filed before 1951 had accomplished the first purpose but not the second. Those aliens were debarred from being citizens but had become liable for military service. The inequity of this arrangement was obvious and, in 1952, Congress adopted §315 of the Immigration and Nationality Act to provide a two-pronged test for citizenship ineligibility. An alien would be permanently debarred from citizenship only if two criteria were met;

ineligible aliens were those who made application for exemption *and* were relieved from liability for military service by virtue of that application.

Under the rubric Argument, we first urge this Court to give §315 the construction which, to us, seems the only reasonable one. §315, we contend, should be read to permit the granting of citizenship to petitioner. He did make application for exemption but he was not effectively relieved from the citizen-obligation of military service. Thus the two-pronged test has not been satisfied and petitioner is eligible for citizenship. Petitioner did, true enough, receive a short-term deferment, from 1950 to the adoption of the 1951 Act, making him conscriptable, but, as history reveals, the relief from liability he was supposed to be receiving in 1950 was a *permanent* relief and the relief from liability Congress had in mind in §315 must have been a *permanent* relief.

Secondly, we urge that petitioner should be granted citizenship pursuant to the rule of "fundamental fairness" announced by this Court in *Moser v. United States,* 341 U.S. 41 (1951). Moser, like petitioner here, executed a request for the alien-exemption. He was not held to it because he was misled as to the consequences of requesting exemption. He was officially told that he would not permanently be debarred from citizenship. An analogous situation is presented here. Petitioner was officially misled as to the nature of the bargain he was making. He was told he could not become a citizen but that he would not be liable for military service. The agreement was illusory; he be-

came liable for military service. Accordingly, petitioner should not be held to the bargain. The manner in which it was presented to him deprived him of the opportunity to make a fair choice between exemption and forfeiture.

Finally, we briefly discuss the constitutional issues presented by the government's construction of the statute. The government reads §315 in a very novel manner. As we have noted, §315 provides that the ineligible alien is one who both applies for exemption and is relieved of liability for military service. Petitioner's "temporary" relief is enough to bring him within the §315 forfeiture, the government says. But all "temporary relief" is not relief within the meaning of §315 according to the government. It finds some cases of "temporary" relief agreeable. The "temporary" relief cases receiving the government's imprimatur are those in which the applicant for exemption found himself not only liable for military training but actually in the army. The upshot of the government's position is this: petitioner falls in the class of ineligible citizens because and *only because* he flunked an induction physical.

We think that position untenable. It is inconsistent with due process because it conditions citizenship on the fulfilling of a condition unrelated to the purposes of citizenship. It is inconsistent with the Eighth Amendment because it works a forfeiture for an illness.

The government has previously fobbed these constitutional issues off with a talismanic incantation about

the power of Congress to do whatever it pleases where Naturalization is involved. Even if that were so (and we are not prepared to concede at this point in time that the Congressional power to withhold citizenship contains a "lesser" power to grant it on any captious conditions Congress sees fit to attach) it would be beside the point. It is not the plain language of §315 with which petitioner quarrels, but the curious and arbitrary gloss proposed by the government and adopted by the Court below. Even where the Constitution arguably places no limits on Congressional authority, this Court, absent the most explicit indications, will not assume that Congress has acted in a manner inconsistent with fundamental constitutional guarantees. The hostility between the government's interpretation of §315 and the most elementary constitutional principles is a certain indication that the government is misreading the statute and that Congress did not intend to grant citizenship only to those persons in petitioner's class who can pass an induction physical examination.

INTRODUCTION

Petitioner, the Court below held, may never become a citizen because he executed a request for release from military service. In exchange for the forfeiture of an opportunity to become a citizen, however, petitioner was to be relieved of all obligation for military service. He did not receive that release: he was drafted. And because he did not receive an effective

release from his military obligation he has not forfeited his right to citizenship. That, at any rate, is what §315 of the Immigration and Nationality Act, 8 U.S.C. §1426(a) says. §315 provides that one who applies for exemption *and* is relieved from military service shall be permanently ineligible for citizenship. It seems unambiguous but, evidently, the Court below read the "relief" language to include a temporary relief. §315, we think, cannot be so read.

Petitioner became liable for military training and service because Congress, in the Universal Military Training and Service Act of 1951, 65 Stat.L. 75, §4 (a), made permanent alien residents conscriptable. The conscripting of neutral aliens who had made no declarations of intention to become citizens was a significant departure from previous law. Before 1951 permanent residents whose alien status remained unchanged were simply not draftable if they elected to avoid military service. Military service was deemed an unavoidable duty of citizens only. Aliens taking advantage of their status placed themselves beyond the pale; they could not become citizens but, because of that, they had no duty to serve. They were forever outsiders. When §315 is read in that light it is manifest that Congress, by "relieved" from military service, meant *permanent* relief and that the "two-pronged" requirement of application for exemption and relief from obligation is satisfied only where the alien has received permanent relief. That same history also demonstrates that at the time petitioner executed the request for release from military obligation both

parties to the agreement, petitioner and the government, believed he was exchanging potential citizenship for a permanent non-draftable status.

Because the history of the alien's exemption from military service so vividly illuminates the critical issues in this case we now turn to that history.

THE HISTORICAL BACKGROUND

(A) Pre-1917

The obligation to bear arms has historically been regarded an obligation of citizenship. Borchard, *Diplomatic Protection of Citizens Abroad,* 11 (1915).

Before the Civil War we insisted that our citizens be free of military service abroad and, consistently, excluded aliens from our armed forces. In 1804 James Madison explained the rationale for our attitude:

> "Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both. . . ."
>
> 4 Moore, *International Law Digest* 52 (1906).

In 1862, Secretary of State Seward confidently wrote: "I can hardly suppose that there exists, anywhere in the world the erroneous belief that aliens are liable here to military duty." But when we adopted conscription during the Civil War, 12 Stat.L. 731 (1863), aliens for the first time became liable to serve

in the armed forces of the United States. The class of aliens upon whom draft liability was imposed was limited to those who had declared their intention to become citizens of the United States. Nevertheless, diplomatic protests followed. We were, it was said, violating home laws and the law of nations by conscripting foreign nationals. Consequently, President Lincoln, by proclamation, extended to declarant aliens the right to withdraw their declarations. If they did so, however, they were required to leave the country within sixty-five days. 13 Stat.L. 732 (1863). In May of 1863, then, the alien was first given the choice of serving our country or becoming an outsider. The choice was presented only to declarant aliens and, should they elect not to serve, they became outsiders quite literally. The bargain was not subtle but neither was it ambiguous: one said he had changed his mind about citizenship because he did not wish to serve and was told to leave. He would, in perpetuity, receive neither the benefits nor the burdens of citizenship.

For the balance of the Nineteenth Century the nonconscriptability of aliens continued to be recognized in practice. In 1880 when American nationals were impressed into military service by Mexico, Secretary of State Blaine asserted that compulsory draft of neutrals was a violation of international law (4 *Moore, supra,* p. 61). Draft liability for declarant aliens was included in the Spanish American War Act (30 Stat.L. 361 (1898)) but the ranks were filled entirely by volunteers and no aliens were drafted. And as late as September 26, 1917, Secretary of State

Lansing admitted the existence of the principle of international law preventing the compulsory drafting of neutral aliens unless the Nation is called upon to resist an invasion. (Hearings before the House Committee on Military Affairs, 65th Cong., 1st Sess. 1917, pp. 4, 10 (S.J. Res. 84)).

(B) Alien conscription and the first world war

The Selective Service Act as originally enacted during the first World War again included all declarant aliens (Act of May 18, 1917, 40 Stat. 76, sec. 2).[1] "Almost at the very beginning the neutral nations' diplomatic representation approached the State Department with numerous requests to relieve their nationals from the operation of the law, and many protests were filed against the induction of individual aliens into the military service, as being in violation of international law and treaty obligations." (Second Report of the Provost Marshal General, p. 98 (1919). See also III *Hackworth, Digest of International Law* 603 *et seq.* (1942)).

Secretary of State Lansing testifying before the House Military Affairs Committee on S.J. Res. 84 (65th Cong. 1st Sess.) stated:

> "So far as the drafting of neutral aliens is concerned it would involve us in the greatest

[1]It is said that approximately 40,000 protests were received. Fitzhugh and Hyde, *The Drafting of Neutral Aliens by the United States*, 36 Am.J.Int.L. 369 (1942). And see, Loessler, *Rights and Duties of Declarant Aliens*, 91 U. of Pa. Law Rev. 321, 334, 335 (1942). Borchard, *Diplomatic Protection of Citizens Abroad*, 64-65 (1915), Vattel, *Law of Nations* 399 (1859); 1 Oppenheim, *International Law* 237, 238 (Lauterpact's 5th Ed., 1937); 2 Hyde, *International Law*, 244, 246, 247 (1922).

difficulties. It has never been done, to my knowledge, in this country; not even during the Civil War. Mr. Bayard states that very frankly in reviewing the question when we were protesting against an effort to compel some of our people, whom we claimed were citizens, to do service in foreign armies. We have had a great many controversies, particularly with Austria and Italy, in regard to the service of naturalized citizens of this country who are of Austrian or Italian origin, and who have returned to their country and been forced into the army to do military service, and we have always insisted that the Government had no right to compel such service. For over 100 years that has been the position of the Government of the United States.

* * * * * * *

"We have, of course, several treaties that affect this question, and which would be substantially abrogated by this legislation if it was adopted; and, on the other hand, those countries with whom we have no specific treaty provisions feel as strongly as those with whom we have, and they have just as much right, although not a technical right, to claim on the general principle that their citizens should not be drafted in this country.

"Mr. Burnett. If you will pardon me, Mr. Secretary, that is the principle of international law, also, in regard to neutral aliens?

"Secretary Lansing. Yes.

"Mr. Burnett. Outside of any treaty regulations?

"Secretary Lansing. Yes; and outside of that, as a question of policy, I think it would be most unwise at the present time, when our relations with many neutrals are—I will not say precari-

ous, but of an irritating character. It is even conceivable that it might result in driving some of them into the war against us, or at least taking a very hostile attitude toward us, which would be most unfortunate at this time."

Accordingly, the Act of May 18, 1917, was amended on July 9, 1918, to provide the customary release-from-liability bargain for declarant aliens:

> "Provided, that a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.
>
> 40 Stat.L. 885 (1918).

The bargain, it will be noted, was not nearly as hard as that of the Civil War. One no longer had to leave the country. But the nature of the bargain, when viewed in the context of the offer, was transparent: one renounced his previous declaration of intention to become a citizen and forever lost the burdens as well as the benefits of citizenship.[2]

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[2]There was an interesting side-skirmish in the World War I Congress pertinent to the present case. Bills attempting to bar from citizenship nondeclarant aliens who claimed exemption from service on grounds of alienage (aliens like petitioner) failed to pass Congress. See *Tutun v. United States*, 12 F.2d 763, 764 (1 Cir. 1926). A related development was the introduction of H.R. 9416 by Congressman Lufkin in 1919. The bill provided for the de-

In 1931 the 1917 statute was modified to permit the naturalization of any neutral alien whose withdrawal of the declaration of intention, application for discharge, and discharge occurred after November 11, 1918 (46 Stat.L. 1931). These statutes were repealed by the Nationality Act of 1940 (54 Stat.L. 1172). It has been held that the repeal restored the opportunity for naturalization to those previously debarred from naturalization as neutral aliens claiming exemption during World War I. (*Interpretation 1 of the Immigration Service,* June 5, 1941; *In re Carlson* 730-P 259786 (D. Ill. 1942); *Petition of Otness,* 49 F.Supp.

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portation of neutral aliens who had claimed exemption from military service. (66th Congress, 1st Session). Secretary of State Lansing opposed this bill on the ground that "it may be looked upon by many foreign governments, whose nationals might be affected thereby, as violative of provisions of treaties between the United States and those countries". (House Immigration Committee Hearings on H.R. 9416, Part 2, p. 25). In the same year, the Solicitor of the State Department, Mr. Woolsey, testified in opposition to a similar bill, stating:

> "My own personal view is that it does not seem quite fair, in the act of July 9, 1918, to give these neutrals a right, allow them to exercise it freely, and then seemingly punish them for exercising that right.
>
> • • • • •
>
> "In the State Department we were opposed to the last clause of the act of July 9, 1918, forever debarring a neutral who withdrew his declaration from becoming a citizen. We thought that it was an illustration of a wrong principle in public to have a class of aliens in this country who never could become citizens.
>
> • • • • •
>
> "Now, if there is a treaty exemption from military service, a foreign government might say, 'Our citizens are exempted from military service in the United States on account of the treaty. But you have added a discriminatory penalty to that exemption by requiring that our citizens who refused to enter the military service must leave the country.'" (House Immigration Committee Hearings on H.R. 10010, 66th Congress, 1st Session, pp. 63, 65, 70).

And see *Petition of Tsuji,* 119 F.Supp. 68 (N.D. Cal. 1953) (nondeclarant alien not liable for military service).

220 (N.D. Calif. 1943); *Contra, In re Urmenta*, 42 F.Supp. 138 (D. Wisc. 1941)).

(C) The Act of 1940

The peacetime conscription act of 1940 (54 Stat.L. 885) conformed to former acts. Registration was required of citizens and "every other male person residing in the United States," excepting diplomatic and consular officials.[3] But only declarant aliens were liable for service. Even so, diplomatic protests were again received based on principles of international law. (Senate Report 394, 77th Congress, 1st Sess.) Secretary of State Cordell Hull advised that one country indicated that under its laws its nationals were prohibited from serving in the armies of a foreign state and on numerous occasions in the past the United States had objected to the compulsory military service of its nationals in the armed services of foreign states. (Letter to Senator Reynolds, Chairman Committee on Military Affairs, May 23, 1941).

The 1940 Act was amended by Public Law 360 after our entry into the Second World War. Registration of aliens could be further limited by presidential declaration. Among the registrants, every male alien between specified ages residing in the United States was liable for service. Thus, the distinction between declarant and nondeclarant aliens was for the first time abandoned in practice. The obligation of military

[3]On October 11, 1940, the Attorney General ruled that under the Selective Service Act, every alien between 21 and 36 who lived or had a place of residence, temporary or otherwise, was required to register under the Act. That interpretation was rejected by this Court in *McGrath v. Kristensen*, 340 U.S. 162 (1950).

service was extended to all neutral resident aliens, it was no longer the exclusive burden of those who had formally announced their desire to receive the benefits of citizenship.

The amendment contained the customary relief-from-liability bargain for those who elected to forego citizenship. §3(a) provided:

> ". . . that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."
>
> 55 Stat.L. 844 (1941).[4]

(D) The Act of 1948

The Selective Service Act of 1948, like the World War II Act, applied to all male citizens and other male persons residing in the United States. It contained the usual relief-from-liability-forfeiture-of-citizenship bargain in §4(a):

> "Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made

[4]In 1945, Congress amended 8 U.S.C. §224(c), defining those ineligible for citizenship, to include anyone barred under §3(a) of the Selective Service Act. 59 Stat.L. 551(1945).

application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."[5]

(E) The Act of 1951

In June of 1951 Congress passed the Universal Military Training and Service Act, 65 Stat.L. 75 providing conscription without alternative for nondeclarant aliens. Relief was made available only to those aliens who have "remained in the United States in a status other than of a permanent resident for a period exceeding one year. . . ." It is the 1951 Act which imposed liability on petitioner and he was drafted pursuant to it.[6]

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[5]An Executive Order, No. 9992 (32 C.F.R. 622.18; Federal Register, August 30, 1948) provided the classification for the exempted aliens:

. . . . .

"Paragraph 622.18 Class IV-C: Aliens

. . . (c) In Class IV-C shall be placed any registrant who is an alien and who, prior to his induction has made application to be relieved from liability for training and service in the armed forces of the United States by filing with the local board an Application by Alien for Relief from Military Service (SSS Form No. 130) executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101). * * *"

It was SSS Form 130 which petitioner executed. (R.T. 45).

[6]Although nondeclarant neutral aliens became liable for military service in 1951 it was another decade before they were permitted to enlist in the Army in times of peace. Because of the traditional notion that military service is a citizen-activity, nondeclarant aliens had previously been excluded from peacetime enlistment. See Ch. 179 §2, 28 Stat.L. 216 (1894). 10 U.S.C. §325 3(c) was amended in 1961 by Public Law 87-143 to permit enlistment of aliens "lawfully admitted to the United States for permanent residence . . ."

ARGUMENT

I.

SECTION 315 OF THE 1952 ACT PROVIDES A TWO-PRONGED TEST; ONE FOREVER FORFEITS AN OPPORTUNITY FOR CITIZENSHIP ONLY WHEN: (A) HE APPLIES FOR EXEMPTION FROM MILITARY SERVICE AND (B) HE IS EFFECTIVELY RELIEVED FROM MILITARY SERVICE BY VIRTUE OF HIS APPLICATON FOR EXEMPTION

The review of the history of alien exemption demonstrates that, prior to 1951, neutral aliens who elected to avoid military service became forever outsiders. They were forever debarred from becoming citizens and forever relieved of the citizen-obligation for military service. At first only declarant aliens were put to the choice and the alternative to military service was banishment. By World War I banishment was no longer the alternative, one was simply debarred from citizenship. By World War II nondeclarant aliens were also put to the choice of accepting the burden of citizenship or forfeiting its benefits. That policy carried over to the 1948 statute, the one pursuant to which petitioner applied for exemption. That statute was unambiguous. The applicant was "relieved from liability for training and service under this Title" but "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." §4(a), 62 Stat.L. 604, 605-606 (1948). Application and application alone was the significant event. A two-pronged test of application plus relief would have been superfluous. For the neutral alien, application *meant* both exemption and relief.

The 1951 Selective Service Act, however, departed significantly from traditional alien-exemption law. Permanent residents were no longer to be given an exemption. They were no longer to be put to the choice between service and citizenship. They were to serve.

But what was to become of those permanent residents who had previously made the election and now found themselves within the class of persons liable for military duty? What of those who had been told they were relieved from military service and debarred from citizenship and now found themselves liable to military service? Was it fair to tell a man he could elect not to be a citizen and receive in exchange a release from citizen-obligations and then, after the choice had been made, impose upon him the citizen-obligation but deny him citizenship? Obviously not. And Congress, in 1952, provided against such a manifestly unfair result by adopting §315 of the Immigration and Nationality Act. 8 U.S.C. §1426(a).

Prior to 1951, as we have noted, application resulted in both exemption and debarment. But as a consequence of the 1951 Act, the application's promise of exemption was no longer good. Application no longer meant exemption and since it no longer meant exemption it should no longer, standing alone, mean debarment. Accordingly:

> "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for ex-

> emption,' and also one who 'is or was relieved or discharged from such training or service on such ground.' "
>
> *Ceballos v. Shaughnessy,* 352 U.S. 599, 601 (1957).

In short, those no longer exempt were no longer debarred. Given the history of the alien-exemption as one of permanent release from liability, and the proximity of the 1952 two-pronged test innovation to the adoption of the alien-service-obligation in 1951, no other construction seems possible. Congress must have meant *effective* and *permanent* relief in §315 because if read otherwise it would mean that Congress intended to impose the supreme obligation of citizenship on those to whom it would deny citizenship on the basis of a bargain Congress was violating by the very imposition of the obligation. All of those exempted prior to 1951, after all, received temporary relief. Including those who were to serve in the armed forces after 1951.

Even the government, we take it, concedes that persons temporarily exempted from the military obligation who were later called and served are not debarred from citizenship. They are not debarred because the two-pronged test is not satisfied. They made application, were temporarily relieved, but, since the 1951 Act subjected them to military service, were not effectively relieved within the meaning of §315. See, e.g., *United States v. Lacher,* 299 F.2d 919 (9 Cir. 1962); *In re Rego's Petition,* 289 F.2d 174 (3 Cir.

1961);[7] *Cannon v. United States*, 288 F.2d 269 (2 Cir. 1961); *United States v. Hoellger*, 273 F.2d 760 (2 Cir. 1960).

But how can petitioner's case be distinguished from *Lacher*, et al.? And why should anyone want to distinguish them? The significant event in both cases is the imposition of the military obligation. Acceptance of that obligation forgives the prior application pursuant to §315's two-pronged test. Petitioner accepted his obligation to the same degree as Lacher. He was simply unable to serve because of a physical disability.

> "The anomaly presented by the record is that, whatever may have been appellant's [initial] inner reluctance or hesitation, he actually did submit to the draft machinery, which processed him and then discarded him. What more should he have done? And had the machinery, instead of throwing him out, chanced to have turned him out as an accepted soldier, would he still be considered disaffected and unattached to the Constitution?"
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> *Petition of Kohl*, 146 F.2d 347, 349 (2 Cir. 1945).

No one feels petitioner would not make a good citizen. No one thinks petitioner is unattached to the principles of the Constitution. Petitioner, by submitting to the draft, accepted the ultimate obligation of citizenship. Since that obligation was imposed and accepted, he was not relieved from military service

[7] In *Rego* the government expressed a desire to have citizenship extended to the petitioner (289 F.2d at 175 and 177) although its theory for achieving the desired result is opaque.

within the meaning of §315 and is eligible for citizenship.[8] *United States v. Bazan*, 97 U.S. App. D.C. 108, 228 F.2d 455 (D.C. Cir. 1955) (per curiam); *In re Wendt*, 300 F.Supp. 725 (N.D. Ill. 1969); *In re Petition for Naturalization of Fabbri*, 254 F.Supp. 858

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[8] §315 seems so unambiguous to us, and the denial of citizenship to petitioner so patently unfair, that we have wondered why the government ever entertained the notion that the temporary relief accorded petitioner was relief under §315. We think it may be a misreading of the language we italicize below:

> "Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and *is or was relieved* or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

The government may have reasoned that the words "is or was" convey a temporal meaning and that "was relieved" refers to persons at one time exempt upon whom the obligation was subsequently imposed. That might be a reasonable reading if there were not a class of persons exempted before 1951 not liable to military service after 1951. But there is such a class. Those who avoided military service and then left the country. The petitioner in *Ceballos v. Shaughnessy, supra*, is a good example. The government was under no obligation to admit him to the country; he was, accordingly, not subject to military obligation and thus did not come within §315. When Congress referred to "is or was" relieved it was referring to two classes, those relieved *permanently* in the present and future and those relieved *permanently* by past actions. Congress was not suggesting that temporary relief met the §315 criteria.

We think that explanation disposes of any potential ambiguity. But to the extent the "is or was" language may be thought to make §315 unclear on this crucial point, we respectfully urge that any ambiguity should be resolved in petitioner's favor. Our reading is "the more normal." *In re Rego's Petition, supra*, 289 F.2d at 176. Moreover, a statute making a permanent resident ineligible for citizenship imposes a penalty and "[a] statute which attaches such a penalty to certain conduct should be construed strictly to avoid an imposition which goes beyond the manifest intent of Congress." *Ibid.* Cf. *Kawakita v. United States*, 343 U.S. 717, 728 (1952); *Perkins v. Elg*, 307 U.S. 325, 337 (1939): "Rights of citizenship are not to be destroyed by an ambiguity."

(E.D. Mich. 1966); *Petition for Naturalization of Joseph Kadich,* 221 F.Supp. 353 (S.D.N.Y. 1963); *Petition of Caputo,* 118 F.Supp. 870 (E.D.N.Y. 1954); *In re Kaufmann's Naturalization,* 394 Pa. 625, 148 A. 2d 925 (1959). *Contra, Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9 Cir. 1968), *certiorari denied,* 391 U.S. 951; and the opinion of the Court below, A.49.

II.

PETITIONER, SINCE HE WAS MISLED AS TO THE NATURE OF THE BARGAIN, DID NOT MAKE A KNOWING WAIVER OF HIS ELIGIBILITY FOR CITIZENSHIP

Petitioner signed the "Application By Alien For Relief From Training And Service In the Armed Forces" on November 14, 1950. The application provided that: "I hereby apply for relief from liability and training in the armed forces of the United States." (R.T. 74). That wording was consistent with §4(a) of the Selective Service Act of 1948, 62 Stat.L. 604, 605-606. That law provided, in pertinent part:

> "Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

Petitioner signed the application for relief because he had only been in the country for nine months, had not yet made up his mind whether he wanted to become a permanent resident and because he had just completed a tour of duty in the Danish Navy. (A. 37-38).

In June of 1951, however, Congress passed the Universal Military Training and Service Act, 65 Stat.L. 75, which provided, in §4(a), that relief from military training was available only to those aliens who have "remained in the United States in a status other than of a permanent resident for a period exceeding one year. . . ." It was this provision that resulted in the removal of petitioner's "relief from liability." And it was on the basis of this provision that, on August 6, 1952, petitioner's local board reclassified him I-A and, twelve days thereafter, ordered him to report for induction into the armed services. Petitioner reported as ordered but was found physically unfit for the service. The determination that petitioner was physically unfit came as a surprise to him; he had wound up his personal affairs expecting that he would be gone for a period of two years. (A. 39). In December of 1952, the Immigration and Nationality Act of 1952 became effective. Section 315(a) of that Act, which the District and Appeals Courts held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment only occurred if the alien applies or has applied for relief *and* "is relieved . . . on such ground."

Petitioner can hardly be held to a standard of clairvoyance that would require him to anticipate the

Acts of Congress of 1951 and 1952 which removed his relief from services in the armed forces. As Judge Moore observed in his concurring opinion in *United States v. Hoellger, supra,* 273 F.2d at 766:

> "Appellee fully understood the consequences of his election in claiming draft exemption. He traded ineligibility to become a citizen against relief from service—not a mere temporary stay or deferment subject to cancellation. However, the government's part of the bargain was that he be relieved from service. When the government by its own Act destroyed Hoellger's exempt status by changing its arrangements with Germany, thereby making its national subject to service in our armed forces and thereafter compelled him to serve, it took away the consideration for the original bargain. Because the government deprived Hoellger of that which it represented to him would be granted, it is in no position to insist upon enforcement of citizenship ineligibility, the price he was paying for that which he did not receive."[9]

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[9] ". . . the government denied petitioner's claim of exemption, called him, in good faith he responded, and then it rejected him, because physically unfit. In these circumstances, to allow it to go back of that examination, and resort to the denied claim to bar his admission, would be to sanction bad faith, and is not tolerable. Despite the claim of exemption, he was deemed fit for the highest duty of citizenship, viz. military service, and by that same token he is fit for citizenship itself." *In re Siem,* 284 F. 868 (D. Mont. 1922), aff'd 299 F. 589 (9 Cir. 1924).

Cf. *Staten Island Hygenia Ice and Cold Storage Co. v. United States,* 85 F.2d 68, 71 (2 Cir. 1936):

> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant . . . It should make no difference that the United States is the party against whom rescission is sought."

Petitioner signed the application for relief under a misconception as to its legal consequences. Under the rule of "elementary fairness" announced in *Moser v. United States,* 341 U.S. 41 (1951), petitioner cannot be held to have waived his right to become a citizen.

In *Moser* the alien applying for exemption from military service believed he could do so without surrendering his right to obtain United States citizenship. This belief was encouraged by advice from the Swiss Legation and the United States State Department; Moser testified that had he known that claiming the exemption would debar him from citizenship, he would not have claimed it. (341 U.S. at 45). This Court held that these facts "understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption." (341 U.S. at 46). (Emphasis in original). This Court ordered Moser admitted to citizenship.

In the immediate case petitioner was similarly misled; he misconceived the legal consequences of his act. He believed, as anyone reading the application he signed would believe (see R.T. 74),[10] that in exchange for the forfeiture of his right to become a United States citizen he would, in return, be permanently exempted from military duty. (A. 38). Petitioner would never have executed the application had he not been misled and is accordingly entitled to rely upon the rule of elementary fairness limned in *Moser.*

---

[10]The application explicitly states that one executing it "shall be relieved from *liability*" (emphasis added). Relief from "liability" connotes removal of obligation, an extinguishment rather than postponement of responsibility.

The District Court held *Moser* inapplicable, reasoning that petitioner knew he would be relinquishing his right to citizenship and had not been misled as to that fact. (A. 46-47). But the District Court's analysis, with all respect, misses the point; it gives a rule of "elementary fairness" a grudging reading. An alternative, and we think sounder, reading of the *Moser* rule was provided by Judge Learned Hand in *Mannerfrid v. United States*, 200 F.2d 730, 732 (2 Cir. 1952), *certiorari denied*, 354 U.S. 918:

> "*§3(a) does not make a claim for exemption an absolute bar* to naturalization; and that it will not be so, if the alien has been misled even by a third person (as Moser was by the Swiss Legation), *if he has been so deprived of a fair chance to make an intelligent choice between exemption and the forfeiture.*" (Emphasis added).[11]

That describes exactly what happened here. Petitioner was given the choice of accepting the obligation of a citizen, military service, or foregoing the *benefits and burdens* of citizenship. Because of the circumstances of the moment, he elected not to be a citizen and in exchange received a release from the citizen-

[11]The language quoted is *dictum;* Mannerfrid, it was held, was barred from citizenship. Mannerfrid maintained that he had been misled into the belief that service in the United States military would result in forfeiture of his Swedish allegiance. He would not, he said, have claimed the exemption had he realized the information he received was erroneous. The Second Circuit held that Mannerfrid's was not a *Moser* case because: "Assuming, as we must that the statute does not in all circumstances charge an alien to construe it aright at his peril, we cannot believe that the Court would extend the excuse to cases where, although he knows that the claim will forfeit his right, he is induced to make it because he is mistaken as to what will be the consequences of not making it." (200 F.2d at 733). Petitioner here, unlike Mannerfrid, does not contend he was mistaken as to the negative consequences of his act

obligation. But the government did not honor its end of the bargain. The "exemption" proved illusory. Within a very short time the government did subject petitioner to the obligation of service and he willingly complied. Surely the government cannot now attempt to hold petitioner to his end of the bargain. Surely there was no intelligent waiver of citizenship on petitioner's part. There was no intelligent waiver because the illusoriness of the consideration, in Judge Hand's words, "deprived (petitioner) of a fair chance to make an intelligent choice between exemption and the forfeiture."

III.

THE CONSTITUTIONAL ISSUES

In our petition for writ of certiorari we urged that the conjunction of the Ninth Circuit's opinions in *United States v. Lacher, supra, Lapenieks v. Immigration and Naturalization Service, supra* and this case, placed an irrational and unconstitutional gloss on §315. (Petition, pp. 10-11). Those three cases pro-

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but that he was misled as to the nature of the bargain. Thus, as we note above, petitioner's case comes squarely within the *Moser* rule as understood by Judge Hand.

As an example of the application of the *Moser* rule where the alien, at the time he sought exemption, did understand that he would forfeit the opportunity for citizenship and was misled about the consequences of not seeking the exemption see *In re Bouchage's Petition*, 177 F.Supp. 887 (S.D.N.Y. 1959). Bouchage felt he could make a superior contribution to the allied cause by joining the Free French rather than the United States Army. He was told by his local board that he could do so only by claiming exemption; in fact, there was a selective service policy permitting Free French service in the absence of the exemption. Bouchage was granted citizenship.

vide a rule giving the benefit of §315's two-pronged test to inductees who pass an Army physical but denying it to those who flunk.

The government's answer is that Congress may do whatever it pleases where naturalization is concerned, relying on Congress's constitutional authority "To Establish an Uniform Rule of Naturalization." U.S. Const., Art. I, §8. Memorandum for the Respondent, p. 7.

The government's position is reminiscent of the argument of the bootlegger running liquor across Arkansas in order illegally to sell it in Mississippi. It is worth recalling Justice Jackson's wry observation about the bootlegger's argument:

> "He asks us to hold that one provision of the Constitution [the Commerce Clause] guarantees him an opportunity to violate the other [the Twenty-first Amendment]. The law is not that tricky."
>
> *Duckworth v. Arkansas,* 314 U.S. 390, 397 (1941) (concurring opinion).

United States v. MacIntosh, 283 U.S. 605, 615 (1931), does, true enough, support the government's "bootlegger" contention that naturalization is a "privilege" to be conferred as Congress wishes. But a lot of water has gone under the constitutional bridge in the intervening forty years. The constitutional doctrine which has emerged since *MacIntosh* removes the underpinning from the notion that the conferring of a benefit or privilege "may be conditional upon the surrender of constitutional rights which could not be

abridged by direct government action." *Keyishian v. Board of Regents of New York,* 385 U.S. 589, 605 (1967). Could it seriously be argued today that a law excluding from citizenship Catholics who refused to renounce their church is constitutionally acceptable? If so the navigation around this language from *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) would have to be nimble indeed:

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."

But the vexing question of the limits of Congressional power when conditioning citizenship need not be explored at any great length. Congress has not passed a law making the passing of an Army physical a condition of citizenship. Rather the Ninth Circuit has said that Congress passed such a law. It is the Ninth Circuit gloss with which we have a quarrel, not the plain language of §315. §315 says that those liable for military service are no longer ineligible for citizenship and petitioner clearly falls within that class. We can only make the word "liable" mean "passed his physical" if we torture it beyond recognition. And there is no reason to put it on the rack. There are a number of reasons why it should not be racked and among those are the constitutional infirmities we adumbrated in our Petition. Those constitutional issues are pertinent even in the unlikely event that Congress has the power to confer Naturalization capriciously and in a manner inconsistant with the Bill of Rights because:

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., Japanese Immigrant Case, 189 U.S. 86, 101, 47 L.ed. 721, 726, 23 S.Ct. 611; Dismuke v. United States, 297 U.S. 167, 172, 80 L.ed. 561, 565, 56 S.Ct. 400; Ex parte Endo, 323 U.S. 283, 299, 300, 89 L.ed. 243, 254, 255, 65 S.Ct. 208; American Power Co. v. Securities and Exchange Com., 329 U.S. 90, 107, 108, 91 L.ed. 103, 116, 117, 67 S.Ct. 133; Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 90 L.ed. 586, 592, 66 S.Ct. 456; Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 94 L.ed. 616, 628, 70 S.Ct. 445. Cf. Anniston Mfg. Co. v. Davis, 301 U.S. 337, 81 L.ed. 1143, 57 S.Ct. 816; United States v. Rumely, 345 U.S. 41, 97 L.ed. 770, 73 S.Ct. 543. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

Greene v. McElroy, 360 U.S. 474, 507-508 (1959).[12]

If this Court will not assume that Congress has abandoned the traditional safeguards of due process

[12]The *Greene v. McElroy* rule is, of course, applicable to naturalization cases. Cf. *Delgadillo v. Carmichael,* 332 U.S. 388 (1947). And see *Terrace v. Thompson,* 263 U.S. 197, 220 (1923):

"Congress is not trammeled and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported. The state may properly assume that the considerations upon which Congress made such classification are substantial and reasonable."

without *the most explicit* of actions then it can be safely assumed that it will not go out of its way to construe a statute in a manner violative of the liberties generally accorded people in this Nation. For the purpose of buttressing our contention that §315 should be read to mean what it says (that all those subjected to liability are eligible for citizenship whether they pass an Army physical or not), we discuss the constitutional issues raised by the Ninth Circuit's rendering of §315.

(A) Due Process And The Denial Of Citizenship To Aliens Because They Fail To Pass A Physical Examination.

Each nation defines for itself the qualities it expects a citizen to possess. The definitions are quite fluid and vague, e.g., "good moral character," "attachment to (x) principles" (in our Nation, those of the Constitution) and the like. But we know of no nation where citizenship is extended only to those physically useful to the armed forces. And the last place we should expect to find physical acceptability to the Army as a necessary condition of citizenship is here. One should not be surprised if he discovers some physically imperfect persons among the huddled masses yearning to be free. Yet the government would have petitioner be a citizen had he passed his induction physical examination (A. 14-15) but says he is ineligible because he did not. The only event standing between petitioner and citizenship is his failure to pass the physical.

There is no conceivable relationship between the ability to pass a physical examination and the ability to be a good citizen. And the federal government, no

less than the state government, is precluded from making irrational classifications. *Bolling v. Sharpe*, 347 U.S. 497 (1954).[13] "[A] statutory classification must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud*, 354 U.S. 457, 465 (1957) (footnote omitted).

It is the goal of Naturalization to insure a population of citizens who share the fundamental values of our society. Granting citizenship to those in petitioner's class who pass physicals (see *United States v. Lacher, supra*) while denying citizenship to petitioner does not advance that purpose in any way. §315 should not be interpreted to produce such an irrational and constitutionally questionable result:

> "The stakes are indeed high and momentous for the alien who has acquired residence here. We will not attribute to congress a purpose to make his right to remain here dependent on circumstances so fortuitous as those upon which the Immigration Service here has seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."
>
> *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

Similarly here, the government has seized on the fortuitous circumstance of an alien's health, or rather of the military's estimation of his physical utility, to

[13] Aliens as well as citizens receive the Fifth Amendment's protections. See *Wong Wing v. United States*, 163 U.S. 228 (1896); cf. *Gonzales v. Landon*, 350 U.S. 920 (1955) (per curiam).

deny him citizenship. "Respect for the law does not thrive on captious interpretations." *Id,* at 391.

(B) Denying Citizenship Because of the Failure To Pass a Physical Examination is Cruel and Unusual Punishment.

That §315's provision debarring aliens from citizenship who have applied for exemption and been relieved from military liability imposes a penalty seems hardly debateable. See *In re Rego's Petition, supra,* 289 F.2d at 176; *In re Gustavson,* 300 F.2d 251, 252 (S.D. Calif. 1924).

If the penalty were exacted as the price for executing an application for exemption from the armed forces its existence would be unexceptionable. But it is not for his application for exemption that petitioner is being punished. The petitioner in *United States v. Lacher, supra,* made the same application and the government thinks he was properly admitted to citizenship. (A. 14-15). It is *only* because he could not pass the Army's physical examination that the government deems petitioner ineligible for citizenship and imposing a penalty (particularly one so extreme) on one because of an illness violates the Eighth Amendment to the United States Constitution. *Robinson v. California,* 370 U.S. 660 (1962).[14]

[14]There is an additional constitutional problem created by the government's interpretation of §315. The government's rendition makes the military the arbiter of citizenship. One becomes a citizen if the military's physicians find him acceptable. "Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen." *Trop v. Dulles,* 356 U.S. 86, 105 (1958) (concurring opinion of Black, J., joined by Douglas, J.).

CONCLUSION

For all the reasons mentioned, petitioner respectfully urges that the judgment of the Court of Appeals should be reversed and his petition for naturalization be granted.

Dated, San Francisco, California,
March 3, 1971

Respectfully submitted,

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*Attorneys for petitioner wish gratefully to acknowledge the assistance in the preparation of this brief of Mrs. Deborah Hinkel, a third-year student at the University of California's Boalt Hall, School of Law.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Summary of argument	6
Argument:	
I. Because petitioner applied for relief from military service before the effective date of the Immigration and Nationality Act of 1952, his eligibility for citizenship is determined by Section 4(a) of the Selective Service Act of 1948; therefore, the making of the application in itself debarred petitioner from citizenship	10
II. Petitioner is also ineligible for citizenship under Section 315(a) of the Immigration and Nationality Act	17
Conclusion	26

CITATIONS

Cases:	
Berenyi v. *District Director*, 385 U.S. 630	25
Cannon v. *United States*, 288 F. 2d 269	18
Caputo, Petition of, 118 F. Supp 870	21
Ceballos v. *Shaughnessy*, 352 U.S. 599	7, 12, 13, 14, 16, 21, 24
Cuozzo, In re Naturalization of, 235 F. 2d 184	21
Fabbri, In re Petition for Naturalization of, 254 F. Supp. 858	21-22
Francisco Ballester Pons v. *United States*, 220 F. 2d 399, certiorari denied, 350 U.S. 830	16
Gilligan v. *Barton*, 265 F. 2d 904	16, 21
Girouard v. *United States*, 328 U.S. 61	24
Giz v. *Brownell*, 240 F. 2d 25	21
Johannessen v. *United States*, 225 U.S. 227	25

421-096—71——1

Cases—Continued Page
Jubran v. *United States*, 255 F. 2d 81 ..... 16, 17, 21
Kadich, In re, 221 F. Supp. 353 21
Kohl, Petition of, 146 F. 2d 347 22
Lapenieks v. *Immigration and Naturalization Service*, 389 F. 2d 343, certiorari denied, 391 U.S. 951 20-21
Machado v. *McGrath*, 193 F. 2d 706, certiorari denied, 342 U.S. 948 21
Maney v. *United States*, 278 U.S. 17 24
Matter of J, 2 I&N Dec. 545 12
McGrath v. *Kristensen*, 340 U.S. 162 17
Mirzoeff, Petition for Naturalization of, Israel, 196 F. Supp. 230 16
Mirzoeff, Application of, 253 F. 2d 671 16
Moser v. *United States*, 341 U.S. 41 ..... 12, 22, 23, 25
Rego's Petition, In re, 289 F. 2d 174 ..... 16, 17, 18
Shomberg v. *United States*, 348 U.S. 540 14
Skender's Petition, In re, 248 F. 2d 92, certiorari denied, 355 U.S. 931 17
United States v. *Bazan*, 228 F. 2d 455 ..... 16, 17, 21
United States v. *Ginsberg*, 243 U.S. 472 24
United States v. *Hoellger*, 273 F. 2d 760 ..... 8, 9, 15, 16, 18, 19
United States v. *Kenny*, 247 F. 2d 139 21
United States v. *Lacher*, 299 F. 2d 919 18
United States v. *Macintosh*, 283 U.S. 605 24
United States v. *Menasche*, 348 U.S. 528 ..... 14, 15
Velasquez v. *United States*, 241 F. 2d 126 17
Wendt, In re, 300 F. Supp. 725 21
Zartarian v. *Billings*, 204 U.S. 170 24

Constitution, statutes and regulations:
Immigration and Nationality Act, § 101(a)(19), 66 Stat. 166, 8 U.S.C. 1101(a)(19) 2, 15-16
Immigration and Nationality Act, § 244, 66 Stat. 214, as amended, 8 U.S.C. 1254 13
Immigration and Nationality Act, § 315(a), 66 Stat. 242, 8 U.S.C. 1426(a) 2, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 23, 24
Immigration and Nationality Act, § 405(a), 66 Stat. 280, 8 U.S.C. 1101 (note) 7, 14, 15, 16
Selective Draft Act of 1917, § 2, 40 Stat. 77 10
Selective Draft Act of 1918, § 1, 40 Stat. 955 ..... 10, 21

Constitution, statutes and regulations—Continued Page
Selective Service Act of 1948, § 4(a), 62 Stat. 605.... 3, 7, 10, 11, 12, 13, 16
Selective Training and Service Act of 1940, § 3(a), 54 Stat. 885.... 10, 11, 16
Selective Training and Service Act of 1941, § 2, 55 Stat. 845.... 10
United States Constitution, Eighth Amendment.... 25
Universal Military Training and Service Act of 1951, § 1(d), 65 Stat. 76.... 11, 12, 16
50 U.S.C. App. 454(a).... 11

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (A. 49) is reported at 432 F. 2d 438. The opinion of the district court (A. 43–47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered July 8, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to October 16, 1970. The petition was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a resident alien who applied for and received an exemption from military service as an alien

on condition of permanent ineligibility for United States citizenship remained ineligible to become a citizen after he was later reclassified as available for military service but not required to serve because of physical unfitness.

STATUTES INVOLVED

Section 315(a) of the Immigration and Nationality Act, 66 Stat. 242, 8 U.S.C. 1426(a), provides:

> Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

Section 101(a)(19) of the Immigration and Nationality Act, 66 Stat. 166, 8 U.S.C. 1101(a)(19) provides:

> As used in this chapter—
>
> * * * * *
>
> The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaties relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62

Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

Section 4(a) of the Selective Service Act of 1948, 62 Stat. 605, provided, in pertinent part:

> Except as otherwise provided in this title, every male citizen of the United States, and every male person residing in the United States * * * shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

STATEMENT

Petitioner is a native and citizen of Denmark, who entered the United States for permanent residence on February 20, 1950. On August 20, 1950, he registered for selective service and was thereafter classified I–A (available for military service) and ordered to report for induction. On October 11, 1950, petitioner was given a medical examination and found physically acceptable for military service (A. 8). On November 14, 1950, as the law then permitted, he filed an ap-

plication for exemption from military service on the ground of alienage, and his draft board thereupon reclassified him IV–C (alien not currently liable for military service) (A. 25–30).

In 1951, an amendment to the Selective Service Act eliminated the prior provision under which permanent resident aliens could apply for relief from military service. On August 6, 1952, petitioner was reclassified I–A, and was ordered to report for physical examination and induction on September 2, 1952. This time petitioner's medical examination showed that he was suffering from bursitis, and he was found not physically qualified for military service. Induction was therefore deferred for three months and on November 24, 1952, petitioner was classified V–A (over 26 years of age) (A. 9, 30–31, 36, 39).

On May 14, 1965, petitioner filed a petition for naturalization in the United States District Court at San Francisco, California (A. 4–5). At a hearing before a naturalization examiner on September 2, 1966 (A. 19 *et seq.*), petitioner testified that after his I-A classification in 1950 he sought the advice of the Danish consul, who explained the alternatives to him, and he thereafter filed the application for relief from military service (Form SSS 130) after he had "weighed the problem" (A. 26–27, 30). The form he signed read in part (A. 12–13):

> I hereby apply for relief from liability for training and service in the armed forces of the United States. I have read the NOTICE given below, and I understand that I will forever lose my rights to become a citizen of the United

States, and I may also be prohibited from entry into the United States or its territories or possessions as a result of filing this application.

The "NOTICE" referred to was as follows:

> Section 4(a) of the Selective Service Act of 1948, provides in part that "any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title, if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application *shall thereafter be debarred from becoming a citizen of the United States.*" Under other existing law, an alien who is not a permanent lawful resident of the United States at the time of execution of this application, thereafter becomes barred from ever making an entry for permanent residence into the United States, including Alaska, Hawaii, Puerto Rico, and the Virgin Islands, unless he enters as a minister of any religious denomination or as a professor of a college, academy, seminary, or university.

Petitioner testified that he had read and understood this Notice before signing the application (A. 28). The following colloquy appears in his statement (A. 29-30):

> Q. Then, is there any possibility that you did not understand that by signing this form you

> would be forever debarred from becoming a citizen of the United States?
>
> A. No, there was not.

In his statement to the designated naturalization examiner, petitioner also stated that he had applied for relief from military service primarily because he did not intend to remain permanently in the United States and planned to return to Denmark after a year or two (A. 28).

On July 16, 1968, petitioner appeared for a hearing before the district court, at which he was represented by counsel (A. 35 *et seq.*). He again testified that his chief reason for making the application for relief from military service in 1950 was his uncertainty whether he wished to remain in the United States (A. 36–38). He also stated that when he signed the application he understood that it would give him permanent deferment and that he would not have signed it if he had known that his deferment would not be permanent (A. 38).

The district court denied the petition for naturalization, (A. 43–47) and the court of appeals affirmed, observing that (A. 49):

> He made a considered decision initially to claim his alienage as a ground for avoiding military service. We believe the situation should be tested as of the time his claim was made.

SUMMARY OF ARGUMENT

I

Petitioner's application for an alien's exemption from military service was made in 1950, at which time

the Selective Service Act of 1948 was in effect. In *Ceballos* v. *Shaughnessy*, 352 U.S. 599, as here, the alien's exemption was later removed, and the alien was reclassified and ordered to report for induction, but failed to pass his medical examination. Nonetheless, this Court held that the language contained in the 1948 Act expressly directed that the making of such an application in itself debarred the alien from citizenship, and the ensuing circumstances did not remove the bar.

Petitioner contends, however, that since he applied for naturalization subsequent to the 1952 effective date of Section 315(a) of the Immigration and Nationality Act, his disqualification is removed by the more liberal test of ineligibility set forth in that statute. But here, as in *Ceballos*, the controlling date is not the date on which the petition for naturalization was made, but instead, the date on which petitioner applied for his alien's exemption. Indeed, Section 405(a) of the Immigration and Nationality Act states that "unless otherwise specifically provided", all "liabilities" arising under prior law shall continue in effect. Petitioner's debarment from citizenship under the 1948 Act is just such a pre-existing "liability". Since Section 315(a) does not contain a specific exception to the Section 405(a) savings clause, petitioner's liability is unaffected by the 1952 statute.

II

Even if the language of Section 315(a) were applicable to this case, petitioner nonetheless remains ineligible to become a citizen. Section 315 requires, in

addition to the making of an application, that the applicant for exemption "is or was relieved" from military service as a result of his application.

It has consistently been held under this statute that one who has subsequently been compelled to perform military service has not been effectively "relieved" from service within the meaning of Section 315. See, *e.g.*, *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2). Petitioner argues that since draft-exempt aliens who actually serve in the military are not debarred from seeking citizenship, his debarment here is not the result of his having sought exempt draft status, but is, instead, the result of his failure to pass a physical examination. However, we interpret the language "is or was relieved" to mean that as long as the alien has not actually served in the armed forces, he remains ineligible for citizenship if he was relieved at any time on grounds of his alienage. The petitioner in this case was relieved from service for at least a year and a half solely on grounds of having sought an alien's exemption. Indeed, his alien's exemption appears to have been the major factor contributing to his permanent relief from service, because prior to seeking that exemption, petitioner had been examined and found physically fit for the draft. *Hoellger* and other cases dealing with exempt aliens who have actually served in the armed forces have specifically excluded from their holdings the situation in which the alien fails to pass his medical examination, on grounds that in these cases "(T)he physical disability may have arisen between the date the alien would have been inducted but for the obtaining of the exemption

and the subsequent date on which induction is ordered." 273 F. 2d at 763, n. 2. Every court of appeals which has directly considered the question involved here has distinguished the *Hoellger* line of decisions and agreed with our reading of Section 315.

We reject petitioner's contention that he was misled in his assumption that his alien's exemption would be permanent, and therefore that he cannot be held to the consequences of his waiver of eligibility for citizenship. The only support for the notion that petitioner was "misled" is his assertion that he did not realize that the exemption would later be removed by statutory amendment. We do not believe that petitioner's failure to predict future changes in the law has any bearing on whether he made a knowing waiver of his citizenship benefits.

We agree, however, that our reading of Section 315 produces a somewhat harsh result, for it is arguable that petitioner is being held here to his end of what might be regarded as a bargain, even though some of the consideration for that bargain has been taken away. Though we believe that there is support for such a result in the language of Section 315, this Court must assess the likelihood that Congress intended in these circumstances to hold petitioner strictly to his waiver.

Finally, petitioner's constitutional arguments are without merit. The condition imposed here with respect to naturalization—that the alien refrain from removing himself from the duty of performing military service—was fair and reasonable. Holding petitioner to his considered choice not to seek citizen-

ship is not in any way, as petitioner contends, a punitive measure inflicted on petitioner because of his failure to pass a physical examination.

ARGUMENT

I. BECAUSE PETITIONER APPLIED FOR RELIEF FROM MILITARY SERVICE BEFORE THE EFFECTIVE DATE OF THE IMMIGRATION AND NATIONALITY ACT OF 1952, HIS ELIGIBILITY FOR CITIZENSHIP IS DETERMINED BY SECTION 4(a) OF THE SELECTIVE SERVICE ACT OF 1948; THEREFORE, THE MAKING OF THE APPLICATION IN ITSELF DEBARRED PETITIONER FROM CITIZENSHIP

The conscription laws of this country since World War I have consistently subjected specified classes of aliens to compulsory service. In Section 2 of the Selective Draft Act of May 18, 1917, 40 Stat. 77-78, Congress imposed liability for military service on "male persons not alien enemies who have declared their intention to become citizens." This statute was amended by Section 1 of the Act of August 31, 1918, 40 Stat. 955, to provide that a neutral alien could obtain relief from military service by withdrawing his declaration of intention "and he shall forever be barred from becoming a citizen of the United States."

This pattern of relief from military service and consequent debarment from citizenship appears, in varying forms, in all subsequent selective service statutes. Thus, Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended by Sec. 2 of the Act of December 20, 1941, 55 Stat. 845, subjected to service all "male person[s] residing in the United States," but authorized an application by

a neutral alien for relief from military service, specifying that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."[1]

The next major statute was the Selective Service Act of 1948. Section 4(a) of that statute, 62 Stat. 605–606, provided for registration and service by every citizen and "every other male person residing in the United States"; it authorized an application for relief from service by any citizen of a foreign country, specifying that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

This provision was amended by Section 1(d) of the Universal Military Training and Service Act of June 19, 1951, 65 Stat. 76, which made aliens admitted for permanent residence liable for service without any provision for exemption.[2] It is this provision that gives rise to the problem in this case.

Petitioner's application for relief from military service was made in 1950, when the Selective Service Act of 1948 was in effect. Under the express direc-

[1] In its original form, the 1940 Act, enacted before the United States became a belligerent, had no provision for relief of aliens from military service.

[2] The 1951 Amendment also imposed the military obligation on aliens who remained in the United States in excess of one year in a status other than that of permanent resident, but permitted those in this non-permanent group to apply for relief from military service: again, the amendment specified that "any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States." This last formula has been retained in the selective service law since then, and is incorporated in 50 U.S.C. App. 454(a).

tion of Section 4(a) of that statute, the voluntary making of an application for relief from service in itself resulted in petitioner's debarment from citizenship. Indeed, this Court has expressly held that the making of the application is the act that triggers debarment from citizenship under the identical language of the 1941 Act. *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 604. And as this Court has observed in *Moser* v. *United States*, 341 U.S. 41, 46:

> [A]s a matter of law, the statute imposed a valid condition on the claim of [an] * * * alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship.

Nothing in the circumstances following petitioner's application avoids the consequence of his considered "choice of exemption and not citizenship". It is true that, as a permanent resident, he was thereafter reclassified as available for service after the 1951 amendment. Attorney General McGrath considered similar circumstances in *Matter of J*, 2 I&N Dec. 545, 552 (1947), involving a neutral alien who had applied for and had been granted relief from military service in 1943. In 1945, after his country became a cobelligerent, he was ordered to report for induction and was rejected as physically unfit. The Attorney General rejected the contention that the exemption claim had not received "complete and uninterrupted recognition", and found the alien ineligible for citizenship, observing:

> The language of the statute seems plain and I think the Congress intended that he should be bound by his election.

This Court confirmed the Attorney General's view of the statutory language in *Ceballos* v. *Shaughnessy, supra.* There an application for suspension of deportation was denied on the ground that the applicant was ineligible for citizenship, because he had obtained relief from military service as a neutral alien in 1943, and thus was disqualified from suspension.[2] His country became cobelligerent in November 1943, and in January 1944, five months after he applied for and obtained relief from military service, he was reclassified and ordered to report for induction, but was rejected as physically unfit. As we have noted, this Court found that the voluntary making of the application rendered Ceballos ineligible for citizenship, and that this debarment was not altered by the subsequent events. The Court observed, 352 U.S. at 605:

> The neutral alien in this country during the war was at liberty to refuse to bear arms to help us win the struggle, but the price he paid for his unwillingness was permanent debarment from United States citizenship.

Petitioner concedes that under the 1948 Act "[a]pplication and application alone was the significant event" (Pet. Br. 21). Petitioner contends, however, that since he applied for naturalization subsequent to the effective date—December 24, 1952—of

[2] The immigration law then in effect, unlike the present statute dealing with suspension of deportation, disqualified aliens ineligible for citizenship. See Section 244, Immigration and Nationality Act, 66 Stat. 214, as amended, 8 U.S.C. 1254. of Section 4(a) of the 1948 Act in *Ceballos* v. *Shaugh-*

Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a), his former disqualification has been removed by the more liberal "two-pronged" test of ineligibility set forth in that statute. (See *infra*, pp. 17–22.)

In *Ceballos*, supra, this Court found Section 315 of the 1952 Act inapplicable to a situation, such as here, in which the application for exemption giving rise to ineligibility for citizenship had been made prior to the effective date of that Act in December 1952. It is true that the Court in *Ceballos* relied on a specific saving clause, relating to pending applications for suspension of deportation, set forth in the last sentence of Section 405(a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U.S.C. 1101 (note). But there is also a more general saving clause in the first sentence of Section 405(a), which states that "unless otherwise specifically provided," all pre-existing "conditions, rights, acts, things, liabilities, obligations, or matters" arising under prior law shall continue in effect. Petitioner's debarment from citizenship under the 1948 Selective Service law is just such a pre-existing "liability."

Although Section 315(a) of the Immigration and Nationality Act does deal generally with any alien "who applies or has applied for exemption," we submit that this is not a "specific" exception to the saving clause which would overcome the preservation of v. *Menasche*, 348 U.S. 528; *Shomberg* v. *United States*, 348 U.S. 540. As this Court stated in the *Menasche* case, which confirmed the view that Section 405(a) is a broad saving clause and should be broadly construed,

> The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress [p. 535].

Indeed, the only specific exception in Section 315 to the preservation of prior rights and liabilities is the opening clause, which directs that the section shall be effective, "notwithstanding the provisions of section 405(b)." Section 405(b) is a saving clause which relates only to petitions for naturalization under prior law pending when the 1952 Act became effective.[4] The limitation of this specific reference to Section 405(b) indicates that Congress intended Section 405(a) to be applicable with respect to the operation of Section 315. Cf. note 3 of Judge Waterman's opinion in *United States* v. *Hoellger, supra,* 273 F. 2d at 763. Our reading is also supported by the definition of ineligibility to citizenship in Section 101 (a)(19) of the Immigration and Naturalization Act,

[4] As this Court specifically held in *Menasche*, the reference in Section 405(b) to pending naturalization petitions does not exclude later filed petitions from the application of Section 405(a).

> As we read the statute, subsection (b) merely implements and emphasizes the operation of its forerunner. It is clear, first, that subsection (b) is not a specific exception of § 405(a), since *both* subsections state that prior law should apply in certain circumstances. The slight negative implication derived from the fact that § 405(b) applies to *pending* petitions for naturalization, and not to those filed after the effective date of the new Act, is overcome by the broad sweep of § 405(a), and its direction that prior law applies unless the Act "otherwise *specifically* provides." 348 U.S. at 536–537.

8 U.S.C. 1101(a)(19), which includes persons permanently debarred from citizenship under the 1940 and 1948 Selective Service Acts.

Since this Court's decision in *Ceballos*, a number of lower courts have considered which law is to be applied in regard to pre-existing disabilities. These courts have expressed differing views by way of dicta; in each instance the applicable statute was either assumed or conceded, and the decision rested on another ground. See *United States* v. *Hoellger*, 273 F. 2d 760, 763, n. 3 (C.A. 2); *Application of Mirzoeff*, 253 F. 2d 671, 672, 674 (C.A. 2); *Petition for Naturalization of Israel Mirzoeff*, 196 F. Supp. 230 (S.D.N.Y.); *In re Rego's Petition*, 289 F. 2d 174, 176 (C.A. 3); *United States* v. *Bazan*, 228 F. 2d 455 (C.A.D.C.); *Francisco Ballester Pons* v. *United States*, 220 F. 2d 399, 404–405 (C.A. 1), certiorari denied, 350 U.S. 830; see also *Jubran* v. *United States*, 255 F. 2d 81 (C.A. 5); *Gilligan* v. *Barton*, 265 F. 2d 904 (C.A. 8).

Here the issue is clearly presented. Petitioner's application for relief from military service was filed in November 1950; the statutory change making him liable for service was enacted in June 1951; his reclassification to I–A occurred in August 1952; he was found unqualified for service on physical grounds and deferred for three months in September 1952; and he was reclassified as over the age for service in November 1952. All of these events occurred prior to the effective date of the Immigration and Nationality Act on December 24, 1952. In light of the saving clause set forth in Section 405(a), we submit that Section 315(a) does not affect petitioner's permanent

disqualification which he incurred under prior law on account of his 1950 exemption application.

II. PETITIONER IS ALSO INELIGIBLE FOR CITIZENSHIP UNDER SECTION 315(a) OF THE IMMIGRATION AND NATIONALITY ACT

Even if the language of Section 315(a) were deemed to govern, we believe petitioner is nevertheless disqualified. The 1952 Act introduced into this section, as a condition for ineligibility to become a citizen, the additional requirement that the applicant for exemption "is or was relieved" from military service as the result of his application. To some extent this second condition has always been applied, since the disqualification has not attached when the request for relief from service was never honored. See *United States* v. *Bazan*, 228 F. 2d 455 (C.A.D.C.). Moreover, in some instances ineligibility for citizenship has been avoided when the application was improperly honored. See *McGrath* v. *Kristensen*, 340 U.S. 162; *In re Rego's Petition*, 289 F. 2d 174 (C.A. 3); contra: *Velasquez* v. *United States*, 241 F. 2d 126 (C.A. 2); *Jubran* v. *United States*, 255 F. 2d 81 (C.A. 5); *In re Skender's Petition*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931.

But there are no such complicating circumstances here. Petitioner's request for relief was properly honored, and he was actually relieved from military service. Nevertheless petitioner contends that his consequent relief from military service was temporary and that because of his reclassification to I–A in August 1952, followed by his rejection on physical grounds

in September 1952, he was not "effectively" relieved from military service on grounds of his alien's exemption, as contemplated by Section 315. In making this contention, petitioner relies especially on a series of decisions, following the lead of *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2), which hold that one who has subsequently been compelled to perform military service has not been "effectively" relieved from such service within the meaning of Section 315. *Cannon* v. *United States*, 288 F. 2d 269 (C.A. 2); *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9); *In re Rego's Petition*, 289 F. 2d 174 (C.A. 3).

In connection with the *Hoellger* line of cases, petitioner argues that since draft-exempt aliens who actually serve in the armed forces are, by force of judicial decision, not debarred from seeking citizenship, petitioner's debarment would be in effect not because of his having sought exempt draft status, but because of his failure to pass a physical examination. Though we find some appeal in this argument, we believe that there is an adequate answer to it. Section 315(a) refers to an alien who *"is or was* relieved" from service on grounds of his alienage (emphasis supplied). It is by no means clear from the language of Section 315 that the alien must be relieved solely and permanently on grounds of his alienage. In fact, the language "is or was relieved" may well mean that as long as the alien has not actually served in the armed forces, he is ineligible for citizenship if he was relieved *at any time* on grounds of his alienage. In other words, the alien's effective relief from the draft may have been the result of more than one ground for

exemption, each relieving the alien for part of the time in which he would otherwise have been required to serve. As long as the alien's exemption was one of the grounds contributing to his effective relief, he has been "relieved * * * on such ground" within the meaning of Section 315. This reading of Section 315 would clearly debar the petitioner in this case from becoming a citizen, since he was relieved from service for more than a year and a half on grounds of having sought an alien's exemption from the draft.

Indeed, the *Hoellger* decision expressly limited its impact to one "who has actually served in the Armed Forces under compulsion of the executive branch" (273 F. 2d at 762), and declared that it would be inapplicable to one who had not actually served. The court stated, *id.* at 763, n. 2:

> An alien who postpones induction by means of an application for exemption, and who is thereafter rejected for physical disability, may legitimately be said to have been relieved from military service by virtue of his exemption application. This results from the fact that the physical disability may have arisen between the date the alien would have been inducted but for the obtaining of the exemption and the subsequent date on which induction is ordered.[8]

[8] Similarly, temporary relief resulting from the alien's exemption could have resulted in an alien's being over draft age after that exemption has been removed. In the instant case, for example, had petitioner's second physical examination been scheduled three months later, he would have been ineligible for the draft, regardless of whether he passed the examination, by virtue of having reached his twenty-sixth birthday (A. 9). It seems, in fact, that because of the proximity of petitioner's twenty-sixth birthday, the draft board did not even bother to

Judge Waterman's reasoning could well apply to the instant case since, prior to receiving his alien's exemption, petitioner had been examined and found physically fit for the draft (supra, p. 3). Though it cannot be said with certainty that petitioner's bursitis developed between his first and second examinations, this appears at least to be a strong possibility. In any event, the significant factor is that petitioner was found physically fit at his first examination, and, had he not sought an alien's exemption, would presumably have served in the military at that time. Under these circumstances, it can reasonably be said that petitioner's alienage was the major factor contributing to his permanent relief from military service.

Other cases holding that a person inducted into military service was not effectively relieved from such service have also based their holdings on the fact that military service was actually performed. In no instance has any appellate court ruled that subsequent availability to service, without actual service, removed the disqualification. In fact, every appellate court which has thus far directly confronted the issue has ruled that the I–A reclassification of a disqualified applicant, followed by his rejection as physically unfit, produced no change in his ineligibility for citizenship. *Lapenieks* v. *Immigration and Naturalization*

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give him a formal classification of IV–F (physically unfit), but merely deferred his reclassification for three months so that he could be classified V–A (over 26 years of age) (A. 9). Surely, the fact that an alien's age relieved him from service after the change in the law should not excuse him from the consequences of the election that kept him from service during the period when he would otherwise have been eligible.

Service, 389 F. 2d 343 (C.A. 9), certiorari denied, 391 U.S. 951; *In re naturalization of Cuozzo,* 235 F. 2d 184 (C.A. 3); *United States* v. *Kenny,* 247 F. 2d 139 (C.A. 2). See also *Ceballos* v. *Shaughnessy, supra.* Moreover, the courts have found that the applicant's ineligibility has not been altered by his reclassification to I-A followed by avoidance of actual induction for other reasons. *Gilligan* v. *Barton,* 265 F. 2d 904 (C.A. 8) (over age); *Jubran* v. *United States,* 255 F. 2d 81 (C.A. 5) (occupational deferment).[4]

The district court decisions cited by petitioner are distinguishable. *In re Wendt,* 300 F. Supp. 725 (N.D. Ill.), and *In re Kadich,* 221 F. Supp. 353 (S.D.N.Y.), involved situations where the applications for relief from service were erroneously accepted at a time when the applicant was no longer subject to service. *Petition of Caputo,* 118 F. Supp. 870 (E.D.N.Y.), dealt with an enemy alien who was not liable for military service under the expresss language of the 1918 Act (see p. 10 *supra*). In none of these cases could it be said that the applicant had been relieved from military service for any period of time whatsoever by virtue of the alien's exemption. Finally, the records were unclear in *In re Petition for Naturalization of*

[4] Subsequent efforts to withdraw an application for exemption have been unsuccessful. *Giz* v. *Brownell,* 240 F. 2d 25 (C.A.D.C.); *Machado* v. *McGrath,* 193 F. 2d 706 (C.A.D.C.), certiorari denied, 342 U.S. 948. Cf. *United States* v. *Bazan,* 228 F. 2d 455.

Fabbri, 254 F. Supp. 858 (E.D. Mich.), and it was not certain whether the application for relief had been honored.[7]

Petitioner also argues that he cannot be held to the consequences of his waiver of eligibility for citizenship because, in making that waiver, he was misled in his assumption that his alien's exemption from the draft would be permanent. In support of this argument, petitioner cites the *Moser* case, *supra*, in which this Court removed an alien's debarment from citizenship on grounds that he had been misled by the Swiss embassy and the United States State Department into thinking that he could apply for a draft exemption without giving up his right to seek citizenship. Petitioner does not claim that anyone withheld information from him or supplied him with incorrect information at the time of his application for exemption from the draft. Indeed, in his statement before the naturalization examiner petitioner declared that there was "no possibility" that he did not understand that by signing the application he would be forever debarred from becoming a citizen of the United States (A. 29–30). Petitioner merely claims that he was not able to foresee the subsequent legislative developments that would threaten his exemption from the draft. We do not believe that petitioner's failure to predict future changes in the law has any bearing on the question whether his waiver of citizen-

[7] *Petition of Kohl*, 146 F. 2d 347 (C.A. 2), is also inapposite, since it involved no application for relief from military service as an alien, and concerned only the loyalty of the alien in the light of his requests for deferment.

ship benefits was knowingly made within the meaning of the *Moser* decision.

Although we do not believe that petitioner can successfully invoke the "elementary fairness" doctrine referred to by this Court in *Moser*, we agree that our reading of Section 315(a) produces a somewhat harsh result. For although petitioner was for a time relieved from military service under his application for an alien exemption in which he knowingly relinquished any claim to citizenship, it is true that he unexpectedly lost the continuing assurance of exemption for which he made that relinquishment. And although we do not believe that petitioner should be relieved from the consequences of his choice merely by virtue of subsequent statutory changes which neither he nor anyone else could foresee, it is undoubtedly true that petitioner's election in 1950 was affected by the statutory scheme then in effect. When the government modified its part of that arrangement by actually calling petitioner for service after the repeal of the statute in 1951—as it undoubtedly had power to do—it is not altogether clear that Congress intended, nonetheless, for petitioner's part of the arrangement—his permanent debarment from citizenship—to continue. Though we find in the statutory language evidence that Congress did intend to hold petitioner strictly to his election, we agree that the language is not entirely conclusive, and that in resolving any ambiguity in the language of Section 315(a), this Court must assess the likelihood that Congress intended to hold petitioner to his end of what might be regarded as a bargain—although there was clearly

no "contract"—after some of the consideration was subsequently taken away.[8]

We note, finally, that petitioner's constitutional arguments are without merit. Primarily they appear to rest on the misconception that our reading of the statute disqualifies petitioner from citizenship because of his inability to pass a physical examination. This is not so. His disqualification results from his voluntary and knowing application for relief from military service, and encompasses all who have made such applications and who have thereby avoided military service.

Nor can it be doubted that Congress is empowered to impose such a condition on naturalized citizenship. It has frequently been stated that naturalization is a privilege, "to be given, qualified or withheld as Congress may determine." *United States* v. *Macintosh*, 283 U.S. 605, 615.[9] Moreover, this Court has noted that the right to acquire citizenship "is purely statutory" (*Zartarian* v. *Billings*, 204 U.S. 170, 175), and that "No alien has the slightest right to naturalization unless all statutory requirements are complied with * * *" (*United States* v. *Ginsberg*, 243 U.S. 472, 475). Therefore there must be strict compliance with the conditions imposed by Congress. *Maney* v. *United States*, 278 U.S. 17, 22;

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[8] Of course, this assessment of intent would not be necessary if the Court accepts our view that it is not Section 315(a) but the preexisting 1948 draft law that determines petitioner's rights. The harshness of the latter law was accepted by this Court in *Ceballos*, *supra*.

[9] Overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61.

Johannessen v. *United States,* 225 U.S. 227, 240. And it is settled that the burden is on the applicant to establish such compliance and that doubts are to be resolved in favor of the United States and against the claimant. *Berenyi* v. *District Director,* 385 U.S. 630, 637. Although the above authorities indicate that the power of Congress to impose conditions on the attainment of naturalization is quite broad, we do not contend that it is unlimited. However, the condition imposed in the instant case—that the alien refrain from removing himself from the duty of performing military service, a duty incumbent on all citizens—was both fair and reasonable.

Finally, the attempt to characterize the disqualification as punitive, and thereby violative of the cruel and unusual punishment clause of the Eighth Amendment, is unpersuasive. There is no evidence of any such punitive intent. On the contrary, the disqualification is the anticipated consequence of a knowing and considered choice between clear alternatives. As this Court has declared, "the statute imposed a valid condition on the claim of [an] * * * alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship." *Moser* v. *United States,* 341 U.S. 41, 46.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 840.—October Term, 1970

Ib Otto Astrup, Petitioner, *v.* Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 24, 1971]

Mr. Justice Black delivered the opinion of the Court.

The issue in this case is exceedingly simple. By signing SSS Form 130—Application by Alien for Relief from Training and Service in the Armed Forces—the petitioner, Ib Otto Astrup, a native of Denmark, agreed to give up his right to become an American citizen, and in exchange, the United States, pursuant to § 4 (a) of the Selective Service Act of 1948, 62 Stat. 605, 50 U. S. C. App. § 454 (a) (1950), agreed to give up the right to induct Astrup into the United States armed forces. Congress later repealed the law under which Astrup was exempted from military service, reneging on its part of the bargain with him.[1] Universal Military Training and Service Act § 4 (a), 65 Stat. 76, 50 U. S. C. App. § 454 (a) (1964). Thereafter the Selective Service System at-

[1] Astrup was lawfully admitted to the United States for permanent residence on February 20, 1950. On November 14, 1950, he executed SSS Form 130, requesting an exemption from military service on the ground of alienage. At that time the Selective Service Act of 1948, § 4 (a), 62 Stat. 605, 50 U. S. C. App. § 454 (a) (1950), provided such an exemption for any alien. The Universal Military Training and Service Act § 4 (a), 65 Stat. 76, 50 U. S. C. App. § 454, which became effective June 19, 1951, amended the earlier provision relating to exemptions for aliens so that the exemption was not available to aliens who were permanent residents of this country.

tempted to draft Astrup and would have succeeded in putting him into uniform but for the fact that he was determined to be physically unfit for the draft. Later, when Astrup decided that he would like to become an American citizen, the Government attempted to enforce Astrup's promise even though it was unwilling to keep its own promise. When Astrup petitioned for naturalization, the United States District Court for the Northern District of California denied his petition on the ground that he was debarred from citizenship. The Court of Appeals for the Ninth Circuit affirmed. 432 F. 2d 438 (1970). We granted Astrup's petition for certiorari, 400 U. S. 1008 (1970), and now reverse.

In support of the decision below the United States emphasizes the fact that Astrup admitted having read a notice proclaiming that

> "Any citizen of a foreign country . . . shall be relieved from liability for training and service under this title, if, prior to his induction into the armed forces, he has made application to be relieved from such liability . . . ; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." Form SSS 130, *quoting* Selective Service Act of 1948, § 4 (a), 62 Stat. 607, 50 U. S. C. App. § 454 (a) (1950).

He further admitted having signed a statement saying, "I understand that I will forever lose my rights to become a citizen of the United States . . . ." Upon the basis of these statements and § 4 (a) of the Selective Service Act of 1948, the United States argues that the case is controlled by our decision in *Ceballos* v. *Shaughnessy*, 352 U. S. 599 (1957), in which we enforced similar citizenship debarment provisions in a deportation case arising under the Immigration Act of 1917, § 19 (c), 39 Stat. 889, as amended, 54 Stat. 671, 62 Stat. 1206, 8 U. S. C. § 155 (1946, Supp. V). *Ceballos*, however, does not govern

this case. In *Ceballos* the Court specifically held that § 315 of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U. S. C. § 1426 (1964), was inapplicable because of the effective date of the 1952 Act and because § 315 was expressly inapplicable to deportation proceedings under the 1917 Act. 352 U. S., at 606, n. 17.

Astrup, unlike Ceballos, is not involved in a deportation proceeding under the Immigration Act of 1917 and consequently the savings clause of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. § 1101, note, is inapplicable.[2] Moreover, Astrup petitioned for naturalization under § 316 of the 1952 Act. Therefore, § 315 of the 1952 Act, not § 4 (a) of the Selective Service Act of 1948, determines the effect to be given to Astrup's 1950 application for exemption from military service. Section 315 provides:

> "Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that

[2] The United States argues that the savings clause of the 1952 Act is applicable, citing *United States* v. *Menasche*, 348 U. S. 528 (1955), and *Shomberg* v. *United States*, 348 U. S. 540 (1955). In *Menasche* the Court held that an alien who had filed a declaration of intention to become an American citizen had a "right in the process of acquisition" preserved by the savings clause which provided: "Nothing contained in the 1952 Act, unless otherwise specifically provided herein, shall be construed to affect the validity of any declaration of intention . . . ." The Court there found nothing in the 1952 Act that specifically nulified Menasche's declaration. In *Shomberg*, on the other hand, the Court found in § 318 of the 1952 Act, 66 Stat. 244, 8 U. S. C. § 1429 (1964), a specific bar to final determination of a naturalization petition by an alien against whom there was an outstanding deportation proceeding. This case is more like *Shomberg* than *Menasche* in that § 315 is addressed to events which may have occurred before the effective date of the 1952 Act and refers specifically to the savings clause as, at least partially, inapplicable.

> he is an alien, *and is or was relieved or discharged from such training or service on such ground*, shall be permanently ineligible to become a citizen of the United States." 66 Stat. 242, 8 U. S. C. § 1426 (1964). (Emphasis added.)

This is a two-pronged prerequisite for the loss of eligibility for United States citizenship. The alien must be one who "applies or has applied for exemption or discharge" from military service and "is or was relieved or discharged" from that service. There is no question that Astrup applied for an exemption. The United States argues that he was temporarily released from military service but recognizes that the release was not permanent. And even the Government is forced to concede the *temporary* release from military service is not by itself sufficient to debar an alien from a later claim to naturalized citizenship, because the Government recognizes the correctness of the Second Circuit's decision in *United States* v. *Hoellger*, 273 F. 2d 760 (1960), that if an alien is once relieved from service but is later compelled to perform military service the bar to citizenship does not arise.

Other courts have distinguished the *Hoellger* holding from the situation where an alien is once relieved from military service but later reclassified for service which he never performs because of intervening circumstances such as physical unfitness. See *Lapenieks* v. *Immigration and Naturalization Service*, 389 F. 2d 343 (1968); *United States* v. *Hoellger*, *supra*, at 762, n. 2. However, there is nothing in the language of § 315 which leads us to believe that Congress intended such harsh and bizarre consequences to flow from an individual's failure to pass a physical examination.[3] We think that Congress used

[3] We find no merit in the Government's contention that Astrup was *effectively* relieved from military service on account of alienage merely because he was found to be medically qualified for the draft on October 11, 1950, before he claimed an exemption and was later

the words "is or was relieved" to provide that an alien who requests exemption from the military service be held to his agreement to relinquish all claims to naturalized citizenship *only* when the Government abides by its part of the agreement and completely exempts him from service in our armed forces.[4]

Consequently, the United States District Court erred in denying Astrup's petition for naturalization on the ground that he was barred from citizenship because he had once claimed an exemption from military service as an alien. The decision of the Ninth Circuit Court of Appeals affirming the District Court is reversed and the case is remanded to the District Court for further proceedings on Astrup's petition for naturalization.

It is so ordered.

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found to be medically unfit for the draft, after the Government repudiated its part of the bargain. The quality of pre-induction physical examinations varies widely and the standards of medical fitness are frequently revised. In any event, the examination is primarily for the benefit of the United States, insuring that those inducted are physically capable of performing adequately and that the United States does not become legally obligated to provide medical treatment for conditions not caused by military service.

[4] Cf. *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (BLACK, J., dissenting): "Great nations, like great men, should keep their word."